Nov. 24. 1693.

I do Allow of the Printing
of this Book:

R. Atkyns.

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MAXIMS AND RULES OF PLEADING;

IN

Actions Real, Perſonal and Mixt, Popular and Penal:

Deſcribing the Nature of Declarations, Pleas, Replications, Rejoynders, and all other Parts of Pleading; ſhewing their Validity and Defects, and in what Caſes they are Amendable by the Court, or Remediable by the Statute-Law, or otherwiſe.

LIKEWISE,

Which of the Parties in his Plea ſhall firſt Offer the Iſſue, and where Special Matter may be given in Evidence upon the General Iſſue; of Demurrers upon Evidence; of Verdicts, General and Special, and of Bills of Exceptions to the ſame; of Judgments, Executions, Writs of Error and Falſe Judgment; and of Appeals, Indictments, and Informations, and the Pleadings relating thereunto.

Publiſhed from the Manuſcript of

Sir ROBERT HEATH, *Knight*;

Lord Chief Juſtice ſucceſſively of the Courts of Common-Pleas *and* Kings-Bench, *in the Reign of King* Charles *the Firſt.*

With Additions of New Matter to every Title, from all the Reports ſince his Time.

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Liber

TO THE READER.

THE Author *of this* Incomparable Treatiſe, *made the* Sentiments *of the Great* Littleton *his* Rule, *in Chuſing that* Subject *He ſo much Commendeth in his* Tenures, *viz.* The Science of good Pleading, *as the moſt Nice and Critical Part in the* Study *of the Law*; *which* He *hath Manag'd in ſuch an* Extraordinary Method, *that all Men of Senſe, of that Profeſſion, cannot ſufficiently enough Admire*

and Value this His moſt Excellent Diſcourſe of Pleading, *ſuitable to the Greatneſs of his Performance therein*

To do him Juſtice, No Perſon (among the Writers of the Common Law) *hath been more happy in the Contrivance of his Deſign, being ſo Conciſe, and his Matter ſo handſomly Couch'd, that I muſt beg the* Reader's *Pardon, if I confeſs it to be very difficult to Imitate him, without taking up as much Time, as He was pleaſed to allow himſelf; which, by the way, was not within the Limits of my Province: However, I have ſo far taken Care to come near him, that the Author himſelf, if he were alive, would not, I preſume, altogether diſlike what I have done.*

But the greateſt Obſtacle I am to remove, is, what ſome Perſons, who have ſeen the Original, do Object,

That

That it is only taken from the *Year-Books*, *Plowden's Commentaries* and *Dyer's Reports*; Things probably good in their Times: But alas! (*ſay they*) what's that to the moſt Refin'd, Polite, and never enough Valued, Equalled, much leſs Outdone, *Reports*, *Abridgments*, *Tracts*, *&c.* ſince their Times? (*Tho' theſe are not wanting in our Compoſition*) *I think to all this I may modeſtly Anſwer:*

That the Year-Books *are the very Foundation of the Law*; Plowden *and* Dyer *perhaps Inimitable*; *and, I hope, this may be further ſaid, without Offence, That had it not been for the Clear, Peſpicuous Light of the* Year-Books, *the later Reporters would have but grop'd* (*as it were*) *in the Dark, and been beholden too much to that incertain Goddeſs,* Experience (*the* Miſtreſs of Fools, *as accounted by the Learned*) *which, how*

how far Experimental Knowledge *differs from* Right Reason, *drawn by Succession of* Time, *from the* Maxims *and* Rules *of the Ancients, in all* Ages, *I leave the* Reader *to guess at; and, if he Doubts, to Consult his* Coke *upon* Littleton.

W. B.

MAXIMS, AND RULES OF PLEADING.

CHAP. I.

Of Counts, or Declarations.

A Declaration, is the ſetting forth, comprizing, or exhibiting in Writing, the Cauſe of Action in any Suit, or Plaint, grounded upon the Common or Statute Law, wherein the Party ſuppoſeth himſelf to be injured. This hath been by ſome ſuppoſed in an Action Real, to be moſt properly termed a Count; but that, being a *Norman* (or Law-*French*) word, is frequently, if not as often, uſed in

A Declaration, what?

our Books, in all other Actions, whether Perſonal or Mixt, for a Declaration.

Of the formal Parts of which a Declaration ought to conſiſt.

A Count or Declaration therefore (being Terms equivocal, and ſo uſed in the following Diſcourſe) ought principally to contain Three things:

Firſt, The Plaintiffs and the Defendant's Names, (which in Actions Real are called, Demandant and Tenant) and the Nature of the Action; and this by ſome is termed the Demonſtration, or Demonſtrative Part of the Count.

Secondly, The Time, the Place, and the Act; in which ought to be comprehended, How, and in what manner the Action did accrue, or firſt ariſe between the Parties; When, what Day, what Year, and what Place, and to Whom the Action ſhall be given; which is called the Declarative Part of the Count.

And Laſtly, The Percloſe or Concluſion, which is *Unde deterioratus eſt, &c.* In which the Plaintiff ought to Aver, and Profer to prove his Suit, and ſhew the Damage he hath ſuſtained, by the Wrong and Injury done unto him by the Defendant.

And this Definition, (conſiſting of a *Tria*, ſomewhat reſembling the Logical *Major*, *Minor*, and *Concluſion*) ſome of the Ancients (among whom none more fond of it than Mr. *Fleetwood*, the Famous Recorder of *London*) conceived to be a perfect Syllogiſm.

Temp. *Eliz.* Regin.

The Statute of 36 *Ed.* 3. *cap. ult.* ſeemeth to help want of Form in Counts, in theſe words; —*By the Ancient Terms and Forms of*

of Pleaders, no Man ſhall be prejudiced; ſo that the Matter of the Action be fully ſhewed in the Declaration, and in the Writ———. However, it was always at leaſt ſo preſumed by the moſt Eminent Pleaders and Sages of the Law, by drawing this Concluſion from the words; *Count ne abatera pur default de Form, iſſint que eyt Subſtance*; that is to ſay in Engliſh, *A Declaration ſhall not abate for want of Form, ſo that it hath ſubſtance.* But Counts are more eſpecially Relieved, when defective, by the Statute of 18 *Eliz. cap.* 14. of Jeofails after Verdict, although they want Form or Agreement with the Regiſter. Note well the Statute, and what Caſes are remedied by the ſame. For, notwithſtanding the Statute of 36 *Ed.* 3. before recited, there is holden a Maxim in our Books, That, *It ſufficeth if a Bar be good to Common Intent; but a Count in the Subſtance thereof muſt be good to every Intent.* And ſo is 3 *H.* 7. 11, & 12. where the Retorn of a Writ of Reſcous was adjudged ill, becauſe the Sheriff named no Place where the Reſcous was made; *the Retorn of a Sheriff reſemblinga Count, which muſt be good to every Intent.* And ſo is 3 *Ed.* 4. 21. *That a Declaration muſt be certain to every Intent.* And yet, *In ſome Caſes a Count ſhall be holden good by Intendment*; as 3 *H.* 6 35. the Plaintiff in Debt did Declare upon an Obligation made at *D.* which extended into two Counties; yet it ſhall be taken without other Declaration to be made in the County where the Action is laid; where Note, that the County is not by expreſs Name declared.

Vide Tit. Jeofails & Repleaders, *infra.* Maxim.

clared. And 20 *H.* 6. 23. the Plaintiff in Account did declare, that the Defendant was Receiver until the Feaſt of St. *Michael*, but ſhewed not which St. *Michael*; and by *Intendment* ſhall be taken for St. *Michael* the *Archangel*. And 38 *H.* 6. In Debt by a Servant againſt his Maſter for Wages, he declared upon a Retainer for Eight years, taking for every year Twenty ſhillings; it ſhall be intended from year to year, according to the Statute.

Next is to be conſidered what ſhall vitiate a Count, and what ſhall not. And firſt Note well, that it hath been held for a Maxim, among the Sages of the Law and Ancient Pleaders, that *for Surpluſage the Count doth not abate*; (*Surpluſagium non nocet*) as is 9 *H.* 6. 25. by *Rolfe*: And ſo is 46 *Ed.* 3. 21. Where in a *Quod ei deforceat* the Demandant did alledge Eſplees in himſelf, and likewiſe in the Donor, and yet good: Although, as it ſeemeth by the Book of 3 *H.* 6. 41. if the Count want Eſplees, the ſame is ill. And ſo is 9 *H.* 6. 41. where ſaid, That if one, in an Attachment upon a Prohibition doth not expreſly declare, that the Prohibition was deliver'd to the Defendant; Ill: For there is ſaid to be a Form to be obſerved. And by 4 *Ed.* 4. 14. and 20 *H.* 6. 18. a Blank or Space left in a Declaration doth abate the ſame. But, by 24 *Ed.* 3. 35. & 54. if the Obligation be *Anno Domini* only in the Date, without mentioning the King's Reign, the Declaration may be ſo alſo; and, as it ſeemeth, may be otherwiſe; *viz. è contra.*

By

By 11 *H.* 472. its ſaid, That in Debt againſt the Ordinary or Gaoler, you ſhall not need to declare how they were made Officers, becauſe an Action lieth againſt Officers in poſſeſſion. And Note, that where a Condition contained in the Obligation is to the advantage of the Plaintiff, there he muſt declare thereof by 21 *Ed.* 4. 36. Otherwiſe if it be to his diſadvantage, or contained in the Condition of the Obligation; and to that intent is 22 *Ed.* 4. *Bro.* tit. *Count* 13. where any thing is to be done by the Plaintiff; and 33 *H.* 6. 3. putteth the difference, where it is contained in the Obligation, and where in the Condition: And to that Intent is 9 *H.* 6. 15, & 16. But yet 26 *H.* 8. 1. the Condition was Indorſed to this purpoſe, That if the Obligee deliver to the Obligor a Bull, that then the Obligation ſhall be void; otherwiſe not: There the Plaintiff is to Declare upon the Condition; but *Shelley* doubted, if he ſhall be compelled to do the ſame of neceſſity. And by 3 *H.* 6. 8. If the Defendant do bind himſelf by Indenture in Forty Pounds, to perform all Covenants contained in the ſame, the Plaintiff ſhall declare upon the Breach of every Covenant, to which the Defendant ſhall plead, *Covenants performed generally*; and then the Plaintiff ſhall aſſign one or more Breaches ſpecially, whereupon Iſſue ſhall be joyned. But as before, ſo in Annuity *pro Conſilio impenſo & impendendo*, the Plaintiff in Annuity, or in Debt for the Arrearages thereof, ought to count that he did (or

was ready to) give Counſel, becauſe a Conſideration Executory: Otherwiſe of Council Executed; as is 3 *H.*6. 35. 38 *H.* 6. 22. 5 *Ed.*4. 104.

But yet 21 *Ed.*4. 49. *Brook, Count* 72. this difference is Ruled there, That where an Annuity is ſo brought by a Special Officer; as by a Keeper, Bailiff, Steward, &c. there he muſt declare of the Service; but otherwiſe in a Declaration *pro Conſilio*, becauſe more general, there the Defendant may aſſign the Breach, or lay the default; *quod Nota.* Alſo, if an Annuity be granted to an Attorney *pro Conſilio impenſo & impendendo*, and a Suit happens to be depending, after the Grant made, between the Grantor and a Stranger, and the Attorney (not being requeſted to give Counſel in that Cauſe to the Grantor) gives Counſel to the Stranger therein: Reſolved by the Court, that this is not againſt the Intent of the Grant, but that the Annuity (notwithſtanding ſuch Advice given againſt the Grantor) ſhould continue, 4 *H.* 8. 13.

Note, it is not material, when you declare in Annuity, to ſet forth the Title or Eſtate of the Grantor, but only to ſay, that the Grantor did grant the Annuity, *Co. Entries, Annuity* 49. And by 15 *H.* 7. 8. it appeareth that *the Plaintiff in Formedon may declare of a Gift, without Seiſin:* And ſo is 34 *H.*6. 48. upon *Dimiſit*; and alſo Common Experience. And note, where there be two Defendants, and the one appears, and the Plaintiff Counts againſt him in Treſpaſs in the

Count de Done ſans Seiſin.

Several Counts in one Declaration.

the *Simulcum*, that he with the other (ſuch a day) did the Treſpaſs, and when the other came, he counted againſt him in like Form, as is 46 *E.* 3. 25. But againſt the latter the Plaintiff varied in the Day. And 44 *Ed.* 3. 41. *Br.* 583. a Man may have Detinue of Charters and of Chattels joyntly, becauſe there one thing is the ground of the Action, *viz.* the Detainer. And 41 *Ed.* 3. *Damage* 75. and 1 *H.* 5. 4. one may have an Action of Debt, where part of the Mony is due upon Bond, and other part by Contract, becauſe there *Debt* is the only Cauſe of Action.

So, by 19 *Ric.* 2. *Caſe* 52. *In things of the like Nature, one Declaration may contain divers ſeveral Wrongs*; and therefore in an Action upon the Caſe, the Plaintiff declared againſt the Defendants, Firſt, For hindring him to hold his Leet. Secondly, For diſturbing his Servants and Tenants, in gathering his Tithe. Thirdly, For threatning ſo, that the People, &c. durſt not come to a certain Chappel, to do their Devotion, and preſent their Offerings: And, Fourthly, For the taking away his Servants and Chattels. And ſee 22 *H.* 7. *Bro.* 87. The Plaintiff did Count *de novo* againſt the Defendant, and the *Priee in Aid*, after *Aid prier*. And 5 *H.* 5. 13. He ſhall alſo Count againſt *Tenant by Reſceit, mutatis mutandis*. The like ſeemeth ſhould be againſt the *Vouchee*. Yet by 8 *H.* 6. 16. the Plaintiff ſhall not Count *de novo* againſt the *Garniſhee*. And 14 *H.* 6. 3. one ſhall not Count againſt him that cometh in upon the *Grand Cape*, until he hath ſaved his Default.

Where the Plaintiff ſhall Count *de novo*, and where not.

Rules to be observed in declaring of the Day, the Year, and Place.

And Note, touching the *declaring* of the *Time* and *Place*, first, by 9 *H.*6.115, 16. *That in Waſt, and ſuch like Mixt Actions, as alſo in Actions Real, one ſhall not Count of the Day, Year, and Place; otherwiſe in Perſonal Actions.* And to the ſame Intent is 7 *H.* 7. 5. And therefore 35 *H.*6.50. a Parſon brought an Action of Debt for the Arrerages of an Annuity granted unto him until he ſhould be promoted to a Benefice, and Declared, that he took a Wife, which determined the Annuity; yet becauſe he did not ſhew the Place where he took her to Wife, the Count was ill. And ſo is 35 *H.* 6. In an Action of Debt brought by an Adminiſtrator, for not ſhewing in what Place the Adminiſtration was committed unto him: But it is otherwiſe of an Executor; for he is not bound to ſhew where he was made Executor, becauſe he may be Executor of his own Wrong.

The diſadvantage of miſtaking the Time, Years, or Number of Acres.

And Note, 35 *H.*6.38. where the Plaintiff in Debt did Count upon a Leaſe of four Acres for the Rent of three Pounds; and the Defendant did plead to the Count, that he did Let thoſe four Acres and other Lands, and a good Plea: But the greater Doubt, whether he ſhould in that caſe take a Travers; for in our Books it is obvious, That *if the Plaintiff in his Declaration miſtake the beginning of a term of Years, the Land, or number of Acres; or declare upon a ſimple Contract, when it is Conditional, the ſame is no good Declaration, and Advantage thereof may be had as well upon the General Iſſue, as otherwiſe.*

And

And in *Fogaſſa's* Caſe, in *Pl. Com. If the Plaintiff Count generally upon a Leaſe, and the Defendant plead*, ne Leſſa pas (non dimiſit,) *the Plaintiff ſhall not give in Evidence a Leaſe by Deed.* And 28 & 29 *H.* 8. *Dier* 32. an Action of Debt was brought upon a Leaſe of ſix and twenty Acres, the Defendant ſaid, that the Plaintiff Let the ſame, and four Acres more; *Abſque hoc*, that he Let the ſix and twenty Acres *tantum*; whereupon Iſſue was taken, and the Verdict found the Demiſe only of one and twenty Acres; and thereupon the Queſtion was, Whether the Verdict had found for the Plaintiff, or for the Defendant? And by *Fitz.* and *Engleſield* it was found for the Plaintiff, becauſe Agreed of both ſides, that ſix and twenty Acres were Let, and the Queſtion was upon the four Acres: But *Baldwin* and *Shelley* ſeemed to be of Opinion, that the Verdict was ill: But *Shelley* ſaid therein, That if the Defendant had pleaded a Plea without a *Travers*, (becauſe he had confeſs'd the Count, and more, it would have been good.) Or if the *Travers* had been, *Abſque hoc quod predictus le Plaintiff dimiſit les four Acres more*, it had been well enough.

But touching this Matter of *Travers*, of the *Quantity*, *Time*, or *Place*, ſee more in the Titles *Travers*, *Iſſue*, and *Verdict*, afterwards in this Book. Note.

And ſee 11 *H.* 6. 5. 'That if in Debt for 'Rent it appeareth by the Count that one 'of the Days is not yet come, the Writ 'ſhall

Several days of payment, and where Execution upon the first default, where not.

'shall abate; but otherwise in Avowry by 'all the Court: *Nota diverſitatem.* And ſee *Fitzherbert's Natura Brevium*, in his Writ of *Debt*, 'That where divers Days of payment 'are contained in a Recognizance, upon 'the firſt default ſhall go out a *Scire facias*; 'but upon a Bill for Debt, not until the laſt 'Day: Notwithſtanding it hath been held, 'That in an Action upon the Caſe, upon an 'Executory Promiſe, the Plaintiff might 'have his Writ upon the firſt default, and 'Recover for that loſs; and ſo upon every 'default.

It appeareth by 7 *Ed.* 4. 15. and 1 *Ed.* 4. 4. 39 *H.* 6. 4. 11 *H.* 4. 55. and 50 *Ed.* 3. 4. in *Brook*, Title *Brief*, by the better Opinion, 'That in Debt, Reſceit of Parcel, Hanging 'the Writ, doth abate the whole Writ; 'but that (as it ſeemeth) is intended where 'the Count and Demand is of one entire 'Contract; as a Precipe of a Mannor, and 'Entry into part: For it is otherwiſe (as it 'ſeemeth) where a *Precipe* is of ſundry Acres, 'and the Demandant enter into but one 'of the Acres: But (by the ſame Book 'of 50 *Ed.* 3. 4.) that ought to be pleaded, *Puis 'le darein Continuance*: And (by moſt of the 'other Books) if the Action were upon Spe-'cialty, then it can neither be pleaded to 'the Writ, or in Bar of the Action, without 'Specialty; and if the Defendant conclude 'his Plea, in Bar, it goeth but to the 'Action for part: But (as it ſeemeth) be the 'Action either upon Specialty, or not, if 'the Defendant plead in Bar the Reſceit of 'parcel,

'parcel, either before, or hanging the Writ, 'he muſt plead the ſame by Deed, and it 'goeth but to that part: But if the Plaintiff 'bringeth an Action of twenty Pounds, and 'declare that he is ſatisfied of ten Pounds, 'the Writ doth abate of his own ſhewing; 'for he ought to bring his Action only for 'that which is behind, and declare himſelf 'to be ſatisfied of the reſt: But if he bring 'his Action for the Whole, and *Nil debet*, 'or a Releaſe be pleaded to Part, that goeth 'but to the ſame; and ſo it ſeemeth by the 'Plea, *quod non debet predictas viginti libras, 'nec aliquem denarium inde.*

And in the ſaid Book of 11 *H.* 4. Debt was brought for Forty Pounds, declaring part upon a Leaſe, parcel upon a Contract, and part for Work done: And to part the Defendant tendred his Law, to other part he pleaded, *ne Leſſa pas (non dimiſit,)* and to the reſidue he tendred the Mony in Court; and the Plaintiff, as to the Plea of the Leaſe, took Iſſue; and, to that of the Mony tendred, he Rejoyn'd, that he had received it accordingly; and, as to the reſidue, he refuſed the Law; and to that, and the Point of Receipt, the Writ only did abate, *quod nota.*

Where the Writ and Declaration are General, as in Treſpaſs *Quare clauſum fregit*, if the Plaintiff ſo Declare, the Defendant, as all the Books agree, may plead a Special Plea to inforce the Plaintaiff in his Repli- cation to aſſign the Place more certain: But this Plea of the Defendant muſt be alſo very

Reaſons for Pleading the Common Bar, and giving a new Aſſign- ment by Re- plication.

very certain, as 4 & 5 *Ph. & Mar. Dyer* 161. for the Defendant to ſay, That the Place where is ſix Acres, is no Plea, unleſs he alſo give it a Name, or Boundaries: And ſo is 22 *H.*6. 24. that the Defendant ſhall plead certainly; and this for the advantage of the Defendant, for if he plead the *General Iſſue*, the Plaintiff may in any Place in that Town aſſign the Treſpaſs: Or elſe, as is the Book 28 *H.* 8. *Dyer* 23. If the Defendant doth ſay, that the Place where is ſix Acres, which is his Freehold, and the Plaintiff Reply, That it is not his Freehold, &c. If the Plaintiff have a Cloſe of like quantity, it ſhall be intended the ſame: But the Plaintiffs New Aſſignment muſt alſo be as true and certain to all Intents, as is 9 *Eliz. Dyer* 204. It muſt be both true in the Name, and in the Boundaries; and muſt not be (as there) *una acr' prat' ſive terr'*.

And as 1 *H.* 7. 11. and 21 *H.* 6. 2. and other Books, the Plaintiff muſt ſay alſo in his Declaration, *alia quam, &c.* And then, as in 14 *H.* 4. 24. the Defendant ſhall not plead, that the Place where *is all one, &c.* but ſhall have advantage thereof beſt by the General Iſſue, if the Pleas aforeſaid be entred; and ſo is, 1 *Ed.* 5. 4. Yet in the ſaid Book 21 *H.*6. 2. the Defendant did Rejoyn, that the Place was *all one, &c.* and known by one Name. But as 27 *H.* 8. 22. where the Defendant in his Bar ſaid, *The Place where was an Acre and three Roods*; the Plaintiff might have aſſigned the Treſpaſs in the three Roods, without the Acre, and the

the Bar, as to the Acre, to no purpoſe. And 1 *H.* 7. 11. the Defendant did plead, That the Place where was three Acres parcel of the Mannor of *B.* of which *A.* did him enfeoff, &c. To which the Plaintiff Replied, That the Place where was the ſaid three Acres, and thirty Acres more, parcel of the ſaid Mannor; and *no Plea*, becauſe he doth not ſay, *Al' quam*, or agreeing with the Defendant's Anſwer: So that it ſeemeth the Plaintiff may Reply to, or take Iſſue upon the Defendant's Plea, if it ſhould be untrue, as for the moſt part, the firſt part of it is.

And it ſhould ſeem alſo by 9 *Ed.* 4. 24. and divers other Books, That the Plaintiff may at his pleaſure, in his Declaration of Treſpaſs, Count of the Place certain, by Name and Number of Acres, and there the Defendant muſt Plead at his Peril: And ſo are the Books of 5 *Ed.* 4. 124. and 9 *H.* 7. 6. in Treſpaſs of Goods; and as 38 *H.* 6. 5 *H.* 7. 8. and other Books in Entry upon the Statute of *R.* 2. and 8 *H.* 6. But 21 *Ed.* 4. 18. in Treſpaſs *quare domum fregit*, without giving a Name, the Defendant may enforce the Plaintiff to a new Aſſignment; notwithſtanding by *Brian* and *Littleton*, 15 *E.* 4. 23. in manner Ruled, that the Plaintiff in his Declaration in Treſpaſs, naming the Place certain, is but Nugation; to which the Defendant by the Plaintiff's Act, ſhall not be enforced to Anſwer: As if the Plaintiff in Debt upon an Obligation doth declare, that the Defendant is of full Age, the

Declaration *ab antiquo*, certain in Treſpaſs, as at this day, by Rule of Court in C. B.

the Defendant may Plead, that he was within Age without Travers: But (as there it ſeemeth) in an Aſſize of Rent the Plaintiff may declare either Generally or Specially, at his pleaſure; according to which laſt recited Book is 20 *Ed.* 4. 9 & 10.

Rules for Declaring in Replevin and Treſpaſs.

Where it is ſaid alſo, that the better Opinion is, to Declare in Replevin, according to the Ancient Uſe, that is to ſay, to name only the Town in the Declaration, and not the Place, or number of Acres; and ſo is 9 *Ed.* 4. 43. And yet notwithſtanding ſee the Book of 14 *H.* 6. 3. that in *Ejectione Cuſtodiæ* the Defendant did Plead Jointenancy, and the Plaintiff aſſigned anew: So 9 *Ed.* 4. 23. in Detinue of Charters; but there the better Opinion ſeemeth, that no New Aſſignment ought to be. By 38 *H.* 6. the Defendant in Treſpaſs did Juſtifie for a Way through the Plaintiff's Cloſe, and the Plaintiff aſſigned the Treſpaſs in another place of that Cloſe. And 39 *Ed.* 4. 7. the Defendant Juſtified that day by the Plaintiff's Licenſe: To which the Plaintiff Replied, That the Defendant came back again the ſame Day, and re-entred his Cloſe; where alſo it appeareth, that where one Juſtifieth the ſame Day, he need not conclude, *Que eſt eadem Tranſgreſſio. Vide Brook*, Tit. *Treſpaſs. Vide Noy*'s Reports, fol. 70. *Roll*'s and *Walter*'s Caſe; where in Replevin the Defendant avowed Damage feſant, as Tenant to *J. S.* who was ſeiſed *in jure Eccleſiæ*, and demiſed to him for years; and held good without ſaying, that he was Parſon: But, *ſecus in*

Quare

Quare Impedit; for there the Plaintiff must name the Defendant *Parson Imparsonee*, because till then, in that Case, he cannot plead in Bar.

By *Co.* 1 *Inst.* fol. 145. the Sheriff ought to take two sorts of Pledges in Replevin, one by the Common Law, *ad prosequend' Querelam*; and the other by the Statute, *De Retorno habendo.* Note, the Plaintiff in Replevin must alledge a Place certain, where the Beasts, Cattle, or Goods were taken. By *Co.* 1 *Inst.* fol. 145. several persons, whose Beasts, Cattle, or Goods are taken, shall not joyn in Replevin; nor is it a good Plea to say, that the Property is to the Plaintiff and another. But by *Co. lib.* 7. in the Case of Swans, a Replevin lies of such things in which one hath but a qualified Property, as of Beasts that are *feræ naturæ*, and made tame, so long as they have *Animum revertendi.* So 2 *Ed.* 2. *Fitzherbert*, Title *Avowry* 182. Replevin lies of a Leveret, or of a Ferret; and by the *Register Original*, fol. 81. it lies of a Swarm of Bees. And by 7 *H.* 4. 28. and 6 *H.* 7. 29. 'tis at the Plaintiff's Election in many Cases, to have Replevin or Trespass for his Cattle or Goods taken, which he will; but he cannot have an Action of Trespass against his Lord for taking them.

But by the Books of Entries, *viz. Rastal.* 567 & 572. and *Coke* 610. and *Fitzh. Nat. Brevium*, fol. 69. *b.* Replevin lies *de averiis capt' & detent' quousque, &c. & de aliis averiis capt' & adhuc detent'*; and there said, that

that when the Plaintiff declares, that the Defendant yet detains the Cattle, and the Defendant appears and makes default, the Plaintiff ſhall recover all in Damages; and alſo 'tis there ſaid, that if the Beaſts are chaſed into another County after they are taken, the Party may have a Replevin in which of the Counties he pleaſeth, or in both. Alſo it appears in *Dyer's Reports* fol. 280. That if the Plaintiff be Nonſuited before Declaration, and he ſueth out a Writ of Second Deliverance, and is again Nonſuited before Declaration, the Defendant ſhall have the Cattle irreplegiable, without any Avowry.

Note, If Replevin be before the Sheriff by Writ, it may be removed by the Plaintiff into the King's Bench or Common Pleas by *Pone*, without Cauſe, and by the Defendant with Cauſe mentioned in the Writ; but if it be before him by Plaint, then it may be removed by the Plaintiff, by a Writ of *Recordari facias loquelam* iſſuing out of Chancery, without ſhewing Cauſe; but if the Defendant removes the Plaint by that Writ, he muſt ſhew Cauſe therein.

Note alſo, If live Beaſts or Cattle, and Goods and Chattels (which are Dead, or things Inanimate) are named together, and Replevied by one Writ, as they may, the live Beaſts or Cattle muſt be named before the dead, as *Quandam vaccam ſuam & quedam averia ſua, que* J. S. *cepit.*

Note farther, That by the Common Law, when the Goods or Chattels of any Perſon are taken, he may have a Writ out of the Chancery,

Chancery, commanding the Sheriff to make Replevin of them, and this Writ is *Vicontiel*, and in the nature of a *Juſticies*, (by which the Sheriff may hold Plea of any value, and in all Caſes;) but when the Defendant claims property, and when more than one live Beaſt is taken, then the Form of the Writ is, *Quod Replegiari faceret* J. S. *quendam Spadonem, vel Equam, &c.* And when many dead Chattels are taken, then the Writ ſhall be, *Quod Replegiari faceret bona & catalla ſua*, and the Plaintiff muſt aſcertain them in the Declaration; but if but one dead Chattel be taken, then the Writ ſhall be, *Quod Replegiari faceret* J. S. *quoddam Examen Apium.*

3 *Cro.* 627, 628. the Plaintiff brought Treſpaſs for taking an Hide; and the Defendant pleaded in Juſtification, That the Major and Communalty of *London* were ſeiſed of an Houſe called *Leaden-Hall*, where he took the ſaid Hide Damage-feaſant, as their Servant, &c. To which the Plaintiff Replied, That *Leaden-Hall* is an ancient Market for Fridays, and that he bought the Hide there on ſuch a Friday; and that he had the ſame on his Back, to carry away, *quouſque* the Defendant took it *prout* in *Narr'*: And tho' Objected, that the Replication is not good, becauſe he concludes not, *Que eſt eadem Captio, &c.* for that he varies from the manner of the *Caption*, and by his Pleading takes from the Defendant's Authority; yet Reſolved good without it, becauſe it agrees with the Defendants Plea, in Time and Place of the *Caption*.

So, 3 *Cro.* 8. 98. in Treſpaſs, the Defendant pleaded, that he is *Clericus & ſeiſitus de Rectoria de* A. *in jure Eccleſiæ*, and makes Preſcription for him, and all his Predeceſſors, Parſons of that Church, to have had a Way, time out of Mind, in ſuch a place; but ſays not, that he was a Parſon; and notwithſtanding it was Objected, that he had not enabled himſelf to make a Preſcription; yet foraſmuch as he hath alledged, that he is ſeiſed *in jure Eccleſiæ*, it tantamounts thereto, and is good.

CHAP. II.

Of Bars, or Pleas to Declarations.

A Bar, in our Law, ſignifies a Deſtruction for ever, or Taking away for a time the Action of him that hath Right; and it is called, *A Plea in Bar*, when ſuch a Bar is pleaded, *Co.* 1 *Inſt.* fol. 372. *Plowd.* fo. 26, 28. *Colthirſt*'s Caſe. *Brook*, Title *Bar*, Num. 101, and 5 *H.* 7. fo. 29. There are alſo *Pleas in Abatement* of a *Writ*, *Plaint*, or *Count*.

A *Plea in Abatement*, in our Law, being as much as *Exceptio dilatoria* with the Civilians, (*Britton*, cap. 51.) or rather an Effect of it: For the Exception alledged and made good, works the *Abatement*. And this Exception may be taken either to the Inſufficiency of the *Matter*, or Incertainty of the *Allegation*,

tion, by *Miſnaming* the Plaintiff, Defendant or Place: To the Variance between the Writ or Count, or Specialty, &c. To the *Incertainty* of the Writ, Plaint or Count: To the *Death* of either of the Parties before Judgment had, and for divers other Cauſes: Upon which Defaults the Defendant may pray, that the Writ, Plaint or Count may Abate, that is, the Plaintiff's Suit againſt him may Ceaſe for that time.

There is alſo a Plea in Abatement *to the Juriſdiction of the Court*, called a *Foreign Plea*, which is, where a Matter is alledged in any Court, that ought to be tried in another: Or, a Refuſal of the Judge as Incompetent, becauſe the Matter in queſtion is not within his Juriſdiction: As if one lay Baſtardy to another in a Court Baron, *Kitchin*, fo. 95. *Anno* 4 *H.* 8. *cap.* 2. and 22 *Ejuſdem cap.* 2, & 14.

But before we Treat of Pleas in Abatement, we ſhall conſider, *What Pleas ſhall Conclude the Defendant, by his Appearance, Continuance, &c.* As to which the Tenant or Defendant ought eſpecially to take Care, that by his Appearance, and taking of *Idem dies* or Imparlance, he Conclude not himſelf of his Advantage in Pleading; for by our Law-Books *Idem dies* is before Continuance, and Imparlance after, and by Conſent of the Party: And therefore Note, *That after Imparlance General, one ſhall not plead to the Juriſdiction*, as is 22 *H.* 6. *a.* But if the Imparlance be Special, *viz. Salvis ſibi omnibus & omnimodis Advantagiis tam ad Breve quam ad Narrationem*, it is otherwiſe:

But to the Writ (it ſeemeth after a General Imparlance one may plead Jointenancy, Non-tenure, Over-Dale and Nether-Dale, and the like, whereof he is not *Eſtopped* by his Appearance, as is the Book of 9 *Ed.* 4. 36. But *Miſnoſmer*, and the like, after a General Appearance, and Imparlance, he ſhall be Concluded of, as are the Books; and therefore the way in that Caſe is to appear in this manner, *viz.* J. S. *qui implacitatur per nomen* J. D. *comperuit & habet diem, vel petit licenciam Interloquendi, vel petit viſum, Salvis ſibi omnibus Advantagiis, &c.*

Of Pleas to the Juriſdiction of the Court.

And by 8 *H.* 6. 18. If one plead to the Juriſdiction of the Court after Declaration, the ſame ſhall not be Entred until the Plea be diſcuſt, and the Continuance ſhall be upon the Writ. And by 50 *E.* 3. 9. upon the View, one ſhall plead *Ancient Demeſn* to the Juriſdiction; and ſometimes the Court ſhall ouſt the Parties of Juriſdiction, although they themſelves ſeem to take no advantage thereby, as in 22 *Ed* 4. 23. *b.* in Treſpaſs between the Parſon and Vicar; otherwiſe he ought to plead it, as before. And by 3 *H.* 4. 12. and 8 *H.* 4. 18. a Foreign Plea in a Perſonal Action, is to the Juriſdiction; otherwiſe in a Real Action. And by 21 *Ed.* 4. 10. the Judgment in that Caſe is, as in other Pleas, that the Writ ſhall Abate.

Foreign Pleas.

Next we ſhall conſider what Pleas may be pleaded to the Juriſdiction, and they are Ancient Demeſn, County Palatine, Cinque Ports, &c. But according to 44 *Ed.* 3. *If the Defendant plead to the Juriſdiction, and Conclude*

clude to the Action, the Juriſdiction is admitted; unleſs as in 1 *R.* 3. 1. *Natura Brevium*, and other Books, where Treſpaſs is brought *Vi & armis*, or where the Freehold is pleaded in the County Court, or Court Baron, then the Court ought to take Conſideration therein. And it appears by 49 *Ed.* 3. 34. That every Caſtle of the Cinque-Ports is intended Gildable, and not of the Ports, *quod nota.* And the Lieutenant of *Dover* Caſtle was Aſſeſt in King *James* the *Firſt*'s time, in the Subſidy; and 4 *Ed.* 4. 16. the *Tower* of *London*, by *Middleſex.*

This Plea to the Juriſdiction being to be pleaded at the firſt, unleſs in ſpecial Caſes, as before: The next in order, is to the Perſon, then to the Count, after that to the Writ, and to the Action of the Writ, and the laſt is in Bar.

Order of Pleading.

And therefore next to the Pleas to the Juriſdiction, are thoſe to the Perſon, which according to *Littleton* are ſix in number, *viz. Villenage, Utlary, Alien, Hors de Protection, Profeſſion*, and *Excommengement.* In pleading the laſt of which, the Defendant muſt ſhew the Letters of *Excommunication*, which Plea doth not abate the Writ; for upon the Plaintiff's ſhewing his Letters of *Abſolution* in Court, he ſhall have a *Reſummons* againſt the Defendant; and by 33 *H.* 6. 23. *Profeſſion* or *Alien* may be alſo pleaded to the Action.

Of Pleas to the Perſon.

And touching *Pleas* to the *Count*, farther than before is mentioned, they are divers, as *Variance* from the *Writ*, wanting *Form* or

Of Pleas to the Count.

ſufficient *Declaring upon the Condition*, and the like, as the Caſe requires; for which ſee afterwards, and *Brook*, Title *Count*.

Of Pleas to the Writ.

And as concerning thoſe *Pleas* which are to be pleaded to the *Writ*, they be of two ſorts, *viz.* the one 'Apparent in the Writ, 'of which the Defendant may at all times 'take advantage, and the other reſting up-'on the Plea of the Defendant; as *Miſ-'nomer*, *Jointenancy*, *Non-tenure*, *Non habetur 'aliqua talis Villa*, or *Over-Dale* and *Nether-'Dale*, of the Place where the Action is 'laid, and not of which the Defendant is 'named; unleſs in Caſes where Utlary 'lieth, and that the Lands lye in *A.* and 'not in *B.* and the like, which the Defen-'dant is bound to take in time, and to look 'that he be not Concluded of them by his 'General Appearance, Continuance, or 'Imparlance, as before is mentioned: And 'Note, that it appeareth in a Report 3 *Eliz.* 'That if the Defendant for Matter appa-'rent plead to the Writ, he ſhall in the 'beginning and ending of his Plea, *petere 'Judicium. de brevi*; but otherwiſe in the Concluſion only.

Of Pleas to the Action of the Writ.

'And touching Pleas to the Action of 'the Writ, they are, where by the Plaintiff's 'own Declaration, or the Defendant's Plea, 'it appeareth that the Plaintiff ought not 'to have the ſame, but another Writ. And, as 26 *H.* 8. *Brook*, *Brief* 409. 'The Defen-'dant may chooſe either to Conclude to 'the Writ, or to the Action of the Writ. And ſo 9 *Ed.* 4. 31. where Dower was brought againſt

againſt a Guardian; and he ſaid, he was not Guardian: *Judgment de Brevi.*

In the next place we will proceed to the Form of the Defendant's Pleadings: And firſt, touching his *Defence* againſt the Plaintiff, it appeareth 34 *H.* 6. 33. and other Books, in *Bro.* Title *Defence*, That in divers Actions, as namely, *Aſſiſe*, *Dower*, *Darein Preſentment*, *Mortdanceſtor*, *Per quæ ſervitia*, *Attaint*, and *Scire facias*, the Defendant ſhall only ſay *Venit & dicit*, without other Defence. And 46 *Ed.* 3. 23. in an Aſſiſe of Nuſance in the Common Pleas, there ſhall be *Defence*, otherwiſe not; and in *Brook*'s Abridgment, Title *Defence*, Num. 67. where one Pleads to the *Juriſdiction* there ſhall be no Defence. Of the Defendant's Pleading, and firſt of his Defence.

But it appears in the ſaid Title 2 *Ed.* 4. and 40 *Ed.* 3. and 35 *H.* 6. That where the Defendant pleads to the Perſon, he may make half a *Defence*, viz. *Venit & defendit vim & injuriam*, without ſaying *quando*, *&c.* And ſo is 7 *H.* 6. there in a *Præmunire*, or Plea to the Juriſdiction, it is only ſaid, *Venit & defendit vim & injuriam:* So as by theſe and other Books, in the ſaid Title of *Defence* it appears, that in Pleas to the Juriſdiction, or the Perſon, the Defendant, as before, cannot make above *Half Defence*: For if he adds to the ſame the words *quando*, *&c.* which make the *Whole Defence*, the ability of the Juriſdiction and Perſon is thereby admitted; but in Pleading to the Writ one may make a *Full Defence*, as appears by all the Books of Entries. Half Defence.

Of the Ordinary Full Defence.

The *Full Defence* is in ſome Caſes *Ordinary*, and in others *Special*: And the *Ordinary Full Defence* in ſome Actions is, *Venit & defendit vim & injuriam quando, &c.* and in others, *Venit & defendit jus ſuum quando, &c.* and where the Defendant ſhall in his Defence ſay, *Venit & defendit vim & injuriam quando, &c.* are theſe Actions, *viz.* Account, Action upon the Caſe, Covenant, Debt, Detinue, Ejectment, *Ne injuſte vexes*, Partition, *Parco fracto*, *Quare Impedit*, *Quo jure*, Replevin, Reſcous, *Recaptione Averiorum*, *Recto*, *Rationabili parte bonorūm*, *Rationabilibus Eſtoveriis*; in all Actions where *Debt* and *Treſpaſs* are given by the Statute; in all Actions of Treſpaſs *de Clauſo fracto*, or *de Clauſo & domo fractis*, with their Incidents, as, *de Bladis & herba depaſt', conculcat', conſumpt', ſuccis'*; *Averiis*, *pedibus ambulando, &c.* or, *de Arboribus ſuccis', amputat', &c.* or, *de Sepibus*, *Foſſatis*, *Solo*; *Eradicat' vel amputat', implet', ſubvers', &c.* or, *de Bonis capt', aſportat', ſpoliat', &c.* or for Battery, Falſe Impriſonment, or Menacing the Plaintiff or his Servants; as alſo in *Waſte*, and other Perſonal and Mixt Actions.

But in a Writ of *Intruſion*, and every *Præcipe quod reddat*, Ayel, Eſcheat, and the like, the Defence is, *Venit & defendit Jus ſuum quando, &c.* And in ſome Caſes the Defence is more Special than before, as *Brook*, *Defence* 45. *In Recto quando Dominus Remiſit Curiam ſuam*, the Defence ſhall be *Venit & defendit Jus prædicti Petentis & Seiſinam ſuam quando, &c.* And *ibid.* 16, & 40.

in

in *Nativo habendo* the Defence ſhall be, *Venit & defendit jus ſuum, & omnem Nativitatem, quando, &c.* And alſo *vide Ibidem* 23, 30, & 31. That in Actions upon the Statutes of Mainteance, Labourers, and the like; and in *Recaptione averiorum*, the Defence is *Venit & defendit vim & Injuriam quando, &c. Et quicquid, &c.* And in Prohibition upon the Statute of *Ric.* 2. & *H.* 4. *Venit & defendit vim & injuriam, quando, &c. Et omnem Contemptum. Et quicquid, &c.* And in an Appeal of Mayhem, as appears 40 *Aſſize* 9. the Defence is, *Ven? & defendit vim & injuriam, Et omnes Felonias & Appella de Mayhemio, Et quicquid quod eſt contra pacem Domini Regis Coronam & Dignitatem ſuas, &c.*

Miſnoſmer how pleaded.

And it alſo appeareth in *Brook* 46. that where the Defendant pleadeth *Miſnoſmer*, he ſhall alledge the ſame before *Defence*, and then ſhall make *Defence*, and ſhew the certainty of the *Miſnoſmer*: And the Vouchee, as it appeareth there, *Num.* 24. ſhall make his Defence in this manner, *Et prædictus* A. B *ut Tenens per Warantiam ſuam defendit Jus ſum quando, &c.* And *Ibidem* 14 *H.* 6. 18. it is a Doubt, whether one ſhall take his *Proteſtation* before or after Defence; and by 21 *H.* 6. 'tis ſaid, That to every of the Plaintiff's Pleas the Defendant ſhall make his Defence *de novo*; *quod nota.*

Of Proteſtations.

And touching *Proteſtations*, we ſhall firſt conſider what they are, and in the next place inform you how, and in what manner they ought to be pleaded.

A *Proteſtation in Pleading* therefore, is by ſome defined to be a Defence of Safeguard to the Party that makes it, from being Concluded by the Act he is about to do, that Iſſue cannot be joyned upon it, *Plowd.* fol. 276, *b. per Walſh ibidem.* Or, it is a Form of Pleading, when one doth not directly affirm or deny any thing that is alledged by another, or which he himſelf alledgeth.

But by *Plowden*, in *Grayſtake* and *Fox*'s Caſe in his *Com.* it is ſaid to be, 'A Saving 'or Excluding of a Concluſion, and (by 'that Book) ought to be after the Defence, 'which is (in that Point) left doubtful by 'the before-mentioned Book of 21 *H.* 6. 26. 'and may not be contrary in it ſelf, or double. As in the before recited Caſe of *Grayſtake* and *Fox*, *Proteſtando*, that he made no Teſtament, *pro Placito*, that he made not the Plaintiff his Executor; becauſe if he made no Teſtament, he could make no Executor: And, as it there appears, the Effectual Matters of the Bar ought not to be taken by Proteſtation: Yet in *Clere Haddon*'s Caſe, the Proteſtation was, *Nul Waſt fait*; and he pleaded, that the Reverſion deſcended to another, and the like.

Of *Colour* in Pleading.

The next Point in order to be diſcuſſed, is touching *Colours in Pleading*; what is properly ſignified by the ſame, and in what Actions they ſhall be given.

What it ſignifies.

Colour ſignifies a Probable Plea, but in truth, Falſe; and hath this End, to draw the Trial of the Cauſe from the Jury to the Judges:

Judges: As, in Treſpaſs for taking the Plaintiff's Cattle, the Defendant ſaith, that before the Plaintiff had any thing in them, he was poſſeſſed of them, as of his own proper Goods, and delivered them to *J. S.* to re-deliver to him again, upon Requeſt; but *J. S.* giving them to the Plaintiff, who ſuppoſing the Property was in *J. S.* at the time of the Gift, took them, and the Defendant took them from the Plaintiff, and thereupon the Plaintiff brought his Action: This is a good *Colour*, and a good Plea. *Vide Doct. & Stud.* lib. 2. cap. 13. and *Brook*, fo. 104. Title *Colour in Aſſize, Treſpaſs, &c.*

And, Firſt, *Colours* may be given in Actions of *Treſpaſs* (as is ſaid above) of Cattle, of Goods, or in Land; or in *Aſſize*, where the Defendant is ſuppoſed a Wrong-doer, and doth not plead the General Iſſue, but a Special Plea to excuſe himſelf of the Wrong, there the Law doth not allow his Plea good, unleſs he ſuppoſe in the Plaintiff ſome *Colour* to bring ſuch an Action: For the Law of it ſelf doth not intend any Man ſo injurious, without Colour, to charge another with Wrongs.

In what Actions it may be given. In Treſpaſs. In Aſſize.

And *Colour* alſo by 19 & 21 *Ed.* 4. *Br.* 56. may be given in *Entry ſur Diſſeiſin* of Rent; and ſo is 2 *Ed.* 4. 17. and in the ſaid *Year-Book*, fo. 27. *Colour* was given in Raviſhment de Gard; and 19 & 22 *H.* 6. *Br.* 19, & 23. *Colour* may be given in Forcible Entries.

In *Entry ſur Diſſeiſin.*

And

In *Action ſur Stat. 5 R.2.*

And ſo is 35 *H.6.* 54. and other Books, that *Colour* may be given in an *Action upon the Statute* of 5 *Ric.2.* and in no other Writs, or Actions, as I can find: Nor in theſe neither, as the Pleading may be; as, if the Defendant pleadeth the General Iſſue, and do not Juſtifie; or pleadeth ſome Plea that meerly *Determineth the Right*; as appears in *Brook* 14 *Aſſize*, a Feoffment with Warranty, Fine, Recovery, and the like. The like Law is 21 *Ed.*4. 18, & 15. where one Juſtifies for *Diſtreſs*, *Wreck*, or *Waifs* and *Eſtrays*, or by any other Matter of Record: But ſee there other Books, *viz.* 2 & 12 *Ed.* 4. 38 *H.*6.7. and 37 *H.*6.7. varying, whether one ſhall give *Colour* where the Defendant doth Juſtify for Wreck, Waifs, and the like, &c. And ſo 34 *H.* 6. 10. in the ſame, and for Offerings.

Upon what *Plea.*

Conveyance from the Plaintiff.

And where the Defendant doth Convey from the Plaintiff himſelf, in ſome caſe he ſhall give *Colour*, and in ſome not: As 6 *H.* 7. 14. where the Defendant Conveyeth from the Plaintiff for life, or years, there he ſhall not give *Colour*; and ſo is 22 *H.* 6. 50. otherwiſe, as it ſeems by 8 *Eliz. Dyer* 146. where the Defendant pleads a Leaſe for years, from a Stranger. But by 15 *Ed.*4. 31. If one plead a Feoffment in Fee from the Plaintiff, by mean Eſtates, he ſhall give *Colour*: Yet by *Brook* 86. If one plead a Feoffment from the Plaintiff himſelf immediate, he ſhall give no *Colour*.

And

And as it ſeems by the ſame Book, and 18 *Ed.* 4. 3. that he that Juſtifies, as *Servant* to another, ſhall give no Colour; and by 22 *H.* 6. 50. and 12 *E.* 4. 15. he that pleadeth *his Freehold* ſhall give no *Colour*. As Servant. His Freehold.

But by the ſame Book, and 12 *H.* 6. 18. He that pleadeth a *Diſcent* ſhall give *Colour*, becauſe it bindeth only the *Poſſeſſion*, and not the *Right*. And by 15 *H.* 7. 10. and 21 *H.* 7. 23, where one *Prayeth in Aid of the King*, there no *Colour* ſhall be given. And 21 *Ed.* 4. *Brook* 56. he that Pleadeth to the Writ, or to the Action of the Writ, ſhall give no *Colour*. But by 5 *H.* 7. 10. If the Defendant Entitle himſelf to a *Deviſe*, he ſhall give *Colour*: Whereof ſee more in the Title of *Colour* in *Brook*. Diſcent. *Aid le Roy.* To the Writ, or to the Action of the Writ.

In the next place ſhall be ſhewn, what are *Sufficient Colours*, and in what manner they are to be pleaded. What be ſufficient *Colours*.

And 50 *E.* 3. 18. where there were *Lord*, *Meſn* and *Tenant*, by Ten ſhillings Rent; and the *Meſn* brought an *Aſſize* againſt the *Lord*, and he pleaded this Matter without giving any *Colour*. And by 20 *H.* 6. 27. If one brings an Action for Treſpaſs done in *D.* and the Defendant Juſtifieth in another Place, and Traverſeth *Abſque hoc quod ipſe eſt Culpabilis in* D. there he may give *Colour*. Lord, Meſn, and Tenant. Juſtification in another Place.

And by 22 *Ed.* 4. 24. 5 *Ed.* 4. 134. and 21 *H.* 6. 32. &c. *Colour* muſt be always given by the *firſt*, and not by any *mean* in the Conveyance. And therefore 38 *H.* 6. 5. the Defendant pleaded, that *A.* was ſeiſed, to whom *Colour* given by the *firſt*, not *mean* Conveyance.

whom *B.* Releaſed, and gave *Colour* by *B.* and ill.

Not by a *Stranger.*

Neither may *Colour* be given by a *Stranger*, as appears by 38 *H.6. Brook* 16. and, as it ſeems, ought to be given by an Eſtate not apparently determined, as is 19 & 21 *Ed.* 4. *Br.*56. where, in Treſpaſs againſt a Parſon, *Colour* was given to the Plaintiff by a Leaſe for Life of his Predeceſſor; but yet there doubted: And 7 *H.* 7. 13 & 14. the Defendant gave *Colour* by a Leaſe *pur auter vie*, which was dead; and Good: So that it ſeems by theſe Books, that although the *Eſtate* appear determined, yet the *Colour* is Good.

Eſtate determined.

Poſſeſſion defeated.

But where a *Poſſeſſion defeated* is given to the Plaintiff, as 9 *H.*6. 32. where the Defendant in an *Aſſize*, or in *Treſpaſs*, doth plead, that he was ſeiſed, until by *A.* diſſeiſed; who did enfeoff the Plaintiff, and he did Enter; a *good Colour.*

And ſo is 2 *H.* 4. and 9 *Ed.* 4. 15. where *Colour* was given by one whoſe Eſtate was defeated by Recovery: And ſo ſeems 35 & 37 *H.*6. *Brook* 6. where the Defendant doth plead, that *A.* took his *Goods*, and gave them to the Plaintiff, and after that he, the Defendant, took them again; and held a good Plea.

Bien.

And accordingly is 2 *H.* 4. 13. where it is not *Immediate Wrong*: Otherwiſe, where he doth plead, that he was poſſeſt until the Plaintiff took his *Goods*, and he did afterwards retake them from the Plaintiff, for that doth amount only to the General Iſſue; but

but there it is more doubted in another Caſe, where the Defendant in Treſpaſs of *Trees* did plead, that he was ſeiſed, until by the Plaintiff diſſeiſed, who did Cut the *Trees*, and ſquared them; and then he, the Defendant did re-take them.

And ſee *Brook* 64. that *Colour* ought to be by a *Title*, or *Poſſeſſion*, doubtful to the Lay-People, whether the ſame be good in Law, or not; and muſt be given to the Plaintiff, and not to another that enfeoffeth the Plaintiff: And therefore 2, & 19 *H.* 6. *Br.* 1, *&c.* it is a good *Colour* to ſay, That the Plaintiff *Claiming as Executor*, when he was not, &c.

Colour ought to be of a doubtful Title.

Colour to the Plaintiff.

As Executor.

And for the Defendant to give the Plaintiff *Colour* by the *Bailment* of *A.* who afterwards gave to the Defendant, is a *good Colour* by 6 *H.* 7. 7. But 28 *H.* 6. 4. to give the Plaintiff *Colour* only by a Bailment, Ill; notwithſtanding to give him *Colour* by the Gift of the Defendant, as Bailor, by 7 *H.* 6. 31. is good.

Bailment.

And ſo is 21 *H.* 6. 36. and 35 *H.* 6. 54. to ſay, That the Plaintiff pretending his *Father to die ſeiſed*, when he did not, did Enter, *no Colour*; becauſe the Defendant himſelf deſtroyeth the ſame. But 9 *H.* 4. *Bro.* 9. that the Plaintiff ſuppoſing his Father to *die ſeiſed in Fee*, when but *for Life*, is a *good Colour*.

Diſcent pretended.

It is a good Colour in *Treſpaſs*, by a Parſon, to ſay, That he Claimeth by the *Biſhop*, and not by the *Predeceſſor* of the Parſon, as is 8 *H.* 6. 9. But 19 *H.* 6. 20. that the Plaintiff

Parſon.

Claiming

Claiming as Parſon, when he never was *Inducted*; no *Colour:* Otherwiſe if *Parſon*, 21 *H.*6.30.

Baſtard. But to ſay, That the Plaintiff *Claimed as Heir*, when he was a *Baſtard*; a *good Colour*; and ſo is that *Year*, fol. 21. Or to ſay, That the Plaintiff pretending *Title to a Reverſion*,

Attornment. *without Attornment*, a *good Colour.*

Coparcener, Joyntenant. Heir. And 19 *H.* 6. 46. 16. to give *Colour* by a *Coparcener* or *Jointenant*, is Good: And 21 *H* 6.43. Doubted, whether a good *Colour* to ſay, that the Plaintiff claimeth by the *Son and Heir* of him, by whom the Defendant doth pretend Title: And 24 *Ed.* 3. 50.

Heir ſpecial. to give *Colour* as *Heir of the part of the Father, &c.* Good.

Eſcheat. By 2 *Aſſ.*7. it is a good *Colour* to ſay, That the Plaintiff *Claimed to Enter as Lord by Eſcheat, &c.* But otherwiſe, as it appeareth by the ſame Book, to give the Plaintiff *Co-*

Abatement. *lour* meerly by *Abatement*, is no *Colour:* But by 12 *H.*7.25. it is a good *Colour* to ſay, That

Emblement. the Plaintiff *Sowed the Corn*, and he did *Reap* and *Cut* the ſame.

Leaſe *a volunt.* And 18 *Ed.*4.10. a good Colour by a *Leaſe at Will.* And 22 *Ed.* 4. 23. it is a good Colour in Treſpaſs for *Tithes*, to ſay, That the

Parſon. Plaintiff claimeth as *Parſon*, and the Defen-

Vicar. dant as *Vicar.*

Confirmation. And by 40 *Ed.* 3. 23. it is a good Colour to plead, That the Plaintiff Claiming by *Confirmation*, made to her Husband and her ſelf; or by the Confirmation of an *Infant*, or *Tenant in Tail*; or Claiming *Dower*, did Enter; although a *Woman having Right*,

cannot

cannot enter into her Dower: Yet all theſe are good Colours.

Other Caſes there be of *Colours*; but by thoſe above-cited, the Reaſon of the others may well appear.

How the Defendant ſhall Conclude his Plea.

The next Point, touching Matter of Form in the Defendant's Plea, is the *Concluſion of his Plea*; and when his Plea ſhall be to the Writ, or otherwiſe.

By 8 *H.* 6. 18, & 19. in *London*, or other Places where they have Special Grant not to be Impleaded elſewhere, there they Conclude *Judgment de brevi*, and ſhall not Conclude to the *Juriſdiction*: And 38 *H.* 6. 19. where the Defendant's Plea doth prove, that the Plaintiff may have another Writ in the ſame Court, there he ſhall Conclude to the Writ, and not to the Juriſdiction: But by *Priſot*, 37 *H.* 6. 24. if the Plea be in *Bar*, and the Concluſion to the Writ, it ſhall be taken in Bar; and ſo is 34 *H.* 6. 1, & 2.

But of the contrary ſide is 37 *H.* 6. 48. in *Forcible Entry*, 'If the Defendant Pleads 'to the Writ, and Concludes to the Action, 'he ſhall be Condemned; becauſe by his 'Concluſion he hath admitted the Writ to 'be good. The like Law, if he Plead to 'the Juriſdiction, and Conclude to the Writ.

And by 26 *H.* 8. *Brook, Brief* 409. If the Plea be to the Action of the Writ, he may ſo Conclude to the Writ: And as it appears in the Titles of *Eſtoppel* and *Waranty*, if a man Plead in Bar an Eſtoppel, Waranty,

or the like, he ſhall Conclude upon the ſame, and not to the Action; although it were in a Writ of Right; as in *Fitzherbert's Natura brevium*, in the Writ of Right Patent appeareth.

Nota. But it appears to be otherwiſe at this day, by all the Books of Entries: For the Tenant, or Defendant, after his Defence immediately, doth not only defend the Action by theſe words, *Et dicit quod prædictus* A. (the Plaintiff) *Actionem ſuam prædictam inde verſus eum* (the Defendant) *habere non debet*; but alſo in the End of his Plea, immediately after his Averment uſeth again the ſame words with an *Et cætera* (&c.) And ſo is the Practice at this day.

Of *Averments* in Pleading. Next in order, we ſhall Treat of *Averments*, their Natures and Signification, and in what Caſes they are to be made uſe of in Pleading; and where not.

Averment defined. The word *Averment*, is diverſly uſed in our Law; by ſome it is taken to be, where a man pleadeth a Plea in *Abatement of the Writ*, or *Bar of the Action*, which, he ſaith, he is ready to prove, as the Court ſhall award. Others ſay, it is an Offer of the Defendant, to make good or juſtifie an *Exception* pleaded in *Abatement* or *Bar* of the Plaintiff's Action; and ſignifies alſo the *Act*, as well as the *Offer* of Juſtifying the *Exception*.

Averment

Averment likewiſe, is either General or Particular.

A *General Averment*, which is the Concluſion of every Plea to the Writ, or in Bar of Replications, or other Pleadings, containing Matter Affirmative, ought to be Averred with an, *hoc paratus eſt verificare, &c.*

Particular Averment is, where the Life of Tenant for Life, or Tenant in Tail, or the Age of an Executor, or the ſenſe or meaning of Words in an Action of the Caſe for Slander, are Averred in theſe words, *Cum hoc quod idem* J. S. *verificare vult, quod, &c.*

And touching the *General Averment*, uſed in the Concluſion of the Defendants Plea, by the words, *Et hoc paratus eſt verificare, &c.* that ought to be to all Pleas in Bar, and to the Writ: But by 3 *Mar. Bro. Averments* 81. need not to be to an *Avowry*, becauſe an Avowry is in the Nature of a Count or Declaration; yet in the Books of *Entries*, it is ſometimes uſed in *Avowries*, and moſt commonly in all Pleas of *Replication*, but not in *Rejoynders*; neither ſeems it to be hurtful, if uſed where needleſs, for then but Surpluſage, and *Surpluſagium non nocet.* When the Defendant ſhall aver his Plea.

But upon the General Iſſue, or a Plea in the Negative, or a Plea apparent in the Writ, ought to be *no Averment*; and 27 *H.* 8.14. Adjudged, that upon a Challenge to the Array there needs *no Averment.*

And it appears by 2 *H.* 7. 2. that in a Replication, *Quod non habetur tale Recordum per quod liquet, &c. Et hoc paratus eſt verificare per Recordum illud*, is contrarient and naught: Where it is ſaid alſo, That if a Plea want an *Averment*, or have not a ſufficient *Averment*, the ſame is not good; *quod nota.*

And it appears by 37 *H.* 6. 14. that in a *Forcible Entry* the Defendant pleaded *Excommengement* in the Plaintiff, without any *Averment*, becauſe no Anſwer is to be made to that Plea.

But it appears in the Books of *Entries*, That where a Plea is either pleaded to the Juriſdiction, or to the Perſon, by Matter *en fait*, as *Profeſſion* or *Villenage*, there be always *Averments*, whichs ſeem to be of Neceſſity, by the laſt recited Book, becauſe to theſe Anſwers may be made; *quod nota.*

And Note, that by the Book of 37 *H.* 6. 23. If one have a Plea to the Whole, he may plead the ſame to a Part: Where it is ſaid by *Moyle*, That a *Releaſe* or *Juſtification*, or any Matter in the Affirmative, pleaded without an *Averment* of the Plea; or pleaded in the Negative, as *Nil debet*, and the like, without the Concluſion, *Et de hoc ponit ſe ſuper Patriam*, (and yet, 1 & 3 *Mar.* 124. the *General Iſſue* was pleaded without that Concluſion, and good) or to plead a Bar in an *Aſſize*, without taking the Tenancy upon him, where divers are named in the Writ, the ſame is Ill.

There

There needs no *General Averment* in a Plea, or *Particular Averment* in a Declaration, of that which will come in more properly on the other ſide, *Hob.* Rep. 78. 124.

And by the ſame Reports, 88. 106. there will need *no Averment* in a Declaration, where it appears there are Reciprocal Remedies. But by the ſame Book, 251. where the Adminiſtrator, *durante minori ætate*, is Plaintiff in a Suit, there the *Nonage* of the Executor muſt be Averred; *Secus*, where he is Defendant.

Yet by *Sheppard's Abridgment*, Tit. *Averment*, fo. 230. the Executor of a Grantee of a Rent or Reverſion, expectant upon an *Eſtate for Life*, may not Avow his Diſtreſs without an *Averment*, that the *Arrerages* incurred after the Death of the Tenant for Life. Adjudged.

And ſo by *Hobart*, fo. 141, 142. he that pleads a *Diſpenſation* to hold in *Commendam*, confirmed by the Kings Charter, muſt aver the Performance of the Condition contained in it.

So by *Perkins*, *cap.* 147. If the *Defeaſance* of a *Recognizance* be dated before, if in this Caſe any uſe be to be made of it, it muſt be Averred to be delivered at or after the time of the Recognizance entred into.

By *Coke's* Rep. *lib.* 8. *Caſe of the City of London*, and *lib.* 9. 54. *Averment* needs not be of what is apparent; as the Conſtitution made in *London*, concerning the Sale of of Wares and Merchandizes appearing to

be agreeable to, and waranted by their Charter, the ſame needs not be Averred to be ſo; and if the Son bring an *Aſſize* of *Mort dance ſtor*, he needs not to Aver, that it is within the time of Limitation, for that it appears to be ſo.

And by the ſame Author, *Lib.* 7. 40. although any other Conſideration, than what is a Deed, may not be *Averred*; yet where there is an Expreſs Conſideration in it ſelf in the Caſe; as where a Uſe of Land is limited to a Wife; this implies a ſufficient Conſideration in it ſelf, and therefore needs *no Averment*.

By *Hobart* 32. an *Averment* may be upon a Will; but by *Co. lib.* 5. 68. an *Averment* will not lye of any thing that is againſt or beſides that, which is againſt or beſides that which is expreſſed in a Will, nor of any thing that cannot be gathered, to be the Mind of him that made the Will, by the Words thereof, nor of any thing that doth not cohere with the Will, eſpecially if the Deviſe be of Lands: As where one Deviſes to *A.* and the Heirs of his Body, the Remainder to *B.* and the Heirs Males of his Body, on Condition that he or they, or any of them, ſhall not alien, &c. In this Caſe no *Averment* may be taken by Witneſſes, that it was the Intent of the Deviſor to include *A.* within the Condition by the words *He*, or *They*, *&c.* So neither may an *Averment* be taken, that the Intent was to give it to any other beſides the Deviſee.

But

But by *Hobart* 50. an Arbitrement in Writing, may not be ſupplied by an *Averment*. And by *Bulſtrode*, firſt Part, fo. 220. and *Popham*, fo. 201. it appears, that if Tenant for three Lives make a Leaſe to another, the Leſſee, in an Action brought by him, needs not to *aver* the Lives under which he claimeth. Nor by *Goldesborough*, fo. 97. needs he that ſueth an Adminiſtrator upon the *Aſſumpſit* of the Deceaſed, *aver* he had Aſſets, after Debts and Legacies paid.

So by *Hobart* 297, and *Coke* on *Littleton* 373. it appears, that if a Tenant diſclaim upon an Avowry in *Replevin*, he ſhall have Judgment, tho' it be falſe: For no *Averment* will lye againſt a violent Preſumption, though it be falſe.

By the Book of 34 *H.* 6. 42. and of 9 *Ed* 4. 4. an *Averment* may be had againſt any part of the Rolls or Records of County-Courts, Hundred Courts, Courts-Baron, or other Courts belonging to Lords of Mannors.

But by *Dyer* 348. 177. no *Averment* will lye againſt ſuch a Retorn as is definitive to the Trial of the thing Retorned; as the Retorn of a Sheriff upon his Writs, the Retorn of the Mayor, Aldermen and Sheriffs of *London* upon a Writ of *Habeas Corpus*, ſent to them, and the like.

But if it be ſuch as is not Definitive, as upon a *Reſcous*, or the like, there an *Averment*, and a Trial upon it may lye. So, if it be ſuch a Retorn as may endanger a mans Life or Inheritance.

Alſo by the Statute of 1 *Ed.* 3. *cap.* 3. and *Goldesbrough* 129, 130. and *Croke* 2 Part, fo. 13. an *Averment* will lye againſt the Bayliffs of *Franchiſes*, ſo that the Lords thereof be not prejudiced thereby.

The ſame Law of *Certificates*: For by *Co. Lib.* 7. 14. *&* *Lib.* 9. 31. and *Bro. Abr.* 332. no *Averment* will lye upon ſuch a Certificate, as is a Definitive Trial in Law of the thing Certified; as the Certificate of a Biſhop touching *Baſtardy*, *Excommunication*, *Marriage*, *&c.*

But by *Co. Lib.* 7. 14. *&* *Lib.* 8. 121. and *Leon.* 1 Part, *Caſe* 285. an *Averment* may lye, and ſhall be received againſt a Certificate which is only to give Information, and in the Nature of a Trial; and may alſo lye againſt a Certificate upon a Commiſſion out of any Court; and may likewiſe be received againſt the Certificate of Commiſſioners, that affirm a man to be a Bankrupt.

But by *Bro.* 332. If a Biſhop Certify, that ſuch a Parſon doth not pay his Tenths *Juxta formam Statuti*, no *Averment* ſhall be received againſt it.

And in *More*, *Caſe* 295. an *Averment* will not lye againſt a Juſtice of the *Kings Bench*, or *Common Pleas*, and the *Cuſtos Brevium*, *quod habetur Warantum Attorn'*, albeit the Party himſelf (againſt whom the Certificate is) be dead, and a *Scire facias* iſſued out againſt his Heir.

So

So in *Yelverton* 34. an *Averment* will not be admitted againſt a Fine taken by Commiſſion, that there is no ſuch man of the Name of one of the Commiſſioners.

By *Co.* on *Littleton* 171. If a Partition be by Writ, although it be unequal it may not be avoided by *Averment*; for ſuch *Averment* againſt the Retorn of a Sheriff, ſhall not be good: But by *Winch*, in his Reports fo. 100. an *Averment* may be made in another Action, tho' not in the ſame.

By *Co. Lib.* 8. 31. and *Dyer* 244. and *Plowden* 277. where a man hath two Sons of one Name, and one of them hath been long abſent and thought to be dead, and this is the Eldeſt, and by Will he gives his Land in general to his Son of that Name, and the Eldeſt Son is alive: In this Caſe an *Averment* will lye, that it was his intent to give it to the Youngeſt, and not to the Eldeſt Son; and upon a Trial the Jury may find it ſo.

But by *Co. Lib.* 4. fo. 4. no *Averment* will lye, that the Deviſe was to any other uſe, but to the uſe of the Deviſee himſelf.

And by *Godbolt* in his Reports, fo. 131. If one deviſe Land to the Heirs of *J. S.* and the Clerk writes it, *To* J. S. *and his Heirs*; this may be holpen by *Averment*, for the Intent is written, and more, and it ſhall be naught for what is againſt his Will, and good for the reſt. But if the Deviſe be to *J. S.* and his Heirs, and it is written, but *to the Heirs of* J. S. there an *Averment* will not help: For an *Averment* to take away a

Sur-

Surpluſage, is good; but not to increaſe that which is defective in a Will.

And Note, That an *Averment* will lye againſt a Teſtament, or Letters of Adminiſtration, although they be under the Seal of the Court, and it ſhall be tried by the Country.

And by *Godbolt* 214. an *Averment* may be, that one is Sued out of his proper Dioceſs, if it doth not appear in the Libel, where one is Sued in the Arches. So where one Sueth in the Court of the *Admiralty*, for a thing done upon the Land, an *Averment* may be, that the Contract was made *infra Corpus Comitatus*.

And by 20 *H.*7. 11. an *Averment*, in ſome Caſes, ſhall be received againſt a Verdict, to prove it falſe.

But by *Dyer* 242. If the Matter contained in an *Award*, and the Matter contained in the *Submiſſion* of that Award, do not agree, it will hardly be ſupplied by *Averment*.

And laſtly, by *Coke*'s *Commentary* upon *Littleton*, fo. 352. *b.* it appears, that the Uſe of an *Averment* is, to aſcertain that to the Court which is generally or doubtfully alledged, that ſo the Court may not be perplexed, of whom, or of what it ought to be underſtood; and a man ſhall never be Eſtopped from making ſuch an *Averment*, to aſcertain the Intent of the Parties; if it be not utterly inconſiſtent with that which is alledged: For an *Eſtoppel* being to Conclude a man from ſpeaking that which is Truth, muſt be certain to every Intent, and

and ſhall never be taken by Argument or Inference.

But of this ſee more Tit. *Eſtoppel*, *infra*.

Next in Order, ſome Points ſhall be diſcuſſed touching *Matters in Bar*; and herein ſhall be ſhewn, What *Pleas* are ſufficient in *Bar* for the Matters of the ſame, and what not. And, Of Pleas in Bar.

Firſt, What *Plea* is good in *Bar* without Deed.

Touching which there is a Maxim in Law, *That where the Action lieth meerly upon the Deed, as upon a Bill, or Obligation, or the like, there no Plea can go in diſcharge of the ſame, without Deed; as all the Books agree.* Maxim in Law.

Yet 10 *H.* 7. 14. if one Count upon a Leaſe by Indenture, or a Bailment by Indenture, the Defendant may plead *Nil debet*, or *Non detinet*, but not *Non dimiſit*, by *Littleton*.

Quære, of a Bargain and Sale by Indenture, for Mony to be paid at a Day: For 28 *H.* 8. *Dyer* 20. upon a Bill teſtifying a Receipt of Mony to be laid out in Pruans, the Defendant ſhall not wage his Law.

The like 37 *H.* 6. 18. in an Annuity with Clauſe of Diſtreſs, *Levied by Diſtreſs*, or *Payment without Acquittance*, a good Plea: Otherwiſe, if granted without Diſtreſs; where holden alſo, that if one be bound in a Bond, with Condition to pay ſuch an Annuity, be the ſame with Diſtreſs, or without, he may (as I conceive) plead Payment without Acquittance, becauſe con-

contained in the Condition of the Obligation.

And by 27 *H.* 8. in *Statam's* Caſe, in an Action againſt the Sheriff, upon an Eſcape, becauſe the Action is not meerly upon the Record, as Debt upon a Judgment, the Defendant may plead, That he let the Priſoner go at large by the Commandment of the Plaintiff.

And yet it is holden in Treſpaſs, for taking away the Plaintiff's Apprentice, 21 *H.* 6. 31. to be no Plea, to ſay, That before taking of the Apprentice away, the Plaintiff diſcharged him of his Service, without Deed; *quod nota.* And ſo indeed ſeemeth 1 *H.* 7. 14. in *Dove's* Caſe, in Covenant againſt an Apprentice.

And 30 *H.* 6. 40. no Plea in a *Scire facias*, to have Execution upon an Annuity, to ſay, That the Plaintiff did deliver him the Deed of Annuity as a Releaſe, and afterwards took it away from him again.

The like ſeemeth by 1 *H.* 7. 14. in *Dove's* Caſe before recited, in Debt upon an Obligation; yet there holden, That by ſome Pleas, as Matters in Law, *viz. Infancy, Dureſs, Razure*, and the like, one may avoid a Deed enſealed.

Of Bars to avoid Circuit of Action.

In the next place we ſhall obſerve, What ſhall be taken to be good *Bars*, to avoid Circuit of Action; which it ſeems the two laſt recited Caſes are not: And therefore ſee firſt, 19 *H.* 6. 62. That if I grant to my Tenant, to hold without Impeachment of Waſt, in *Ceſſavit, &c.* Or, the King grants to

to one, to be discharged of *Disms*, the same may be pleaded by *Rebutter*, and the Party not put to bring his Action of *Covenant*, or to sue by *Petition*.

And so it seems of *Waste*, in 21 *H.* 6. 47. be the Grant by Lease; whereof Doubt is made afterwards in 21 *H.* 7. 23, & 30. where the Principal Case was, That the Obligee granted, that if he did Implead the Obligor (before such a Day) the Obligation should be void; and a *good Bar*. And upon that Reason shall the *Garnishee*, or *Tenant by Resceit*, Rebut by a Release or Waranty.

And upon the Reason aforesaid it is, that where one Thing is granted in Law, so another, (especially of Things Executory, and not Executed) if he be Interpleaded of that which to him appertains, he shall plead the same in Bar of that whereof he made the Grant; as appears by *Perkins*, in the Title of *Exchanges*, where Rent is granted for Distress.

But yet by 15 *Ed.* 4. 9 *Ed.* 4. and 24 *Ed.* 3. Abridged by *Brook* in the Title of *Conditions*, 61. it seems in that Case to be to the contrary, because Executed, and therefore not like where an Annuity is granted *pro Consilio*. The like, where one holdeth to Incloſe, taking the ancient Pale, or where one granteth to me an Annuity, to have a Gorse, or a Gutter in my Land, because an Easment.

And by 15 *H.* 7. 10. If you Covenant to serve me, and I to give you Five Pounds for your Service: Or, you Covenant to Marry

Marry my Daughter; and I, in like manner, to give you Twenty Pounds, as a Marriage Portion: If you ſerve me not, or Marry not my Daughter, I may plead the ſame in Bar. Otherwiſe, if the Covenant on either part had been expreſly, and not depending upon the others Act.

How to plead the Performance of a Condition of an Obligation.

Next ſhall be ſhewn, In what manner one ſhall plead in Bar, the Performance of a Condition of an Obligation. And,

Firſt, Touching the Performance of Covenants in Indentures, omitting the variety of Ancient Books, it appears 27 *H.*8. 1. and 33 *H.* 8. *Brook*, *Covenant* 35. That the Defendant ought to plead the Indenture, and the ſpecial manner particularly, how he hath performed every Covenant.

See alſo accordingly, 10 & 11 *Eliz. Dyer* 279. and 28 *H.*8. *Dyer* 36. But, as it ſeems there, need not aver, *quæ ſunt omnia & ſingula Conventiones, &c.* becauſe referr'd to a Matter in Writing: The like of a Record. And for that Reaſon, it ſeems of neceſſity, that he need not to plead, *prout in eadem Indentura. Quære tamen.*

But if not referr'd to Writing or Record, as hath been ſaid before, then it ſhall be otherwiſe: As, if I am bound to Enfeoff you of all my Lands in *Dale*, I muſt ſhew the Number of Acres, and plead alſo, *quæ ſunt omnia, &c.*

Note. Yet now, at this Day the Courſe of the Practice is, (notwithſtanding the Covenants are reduc'd into Writing, after they are recited in the Plea) to inſert this Clauſe, *Prout per eandem Indenturam plenius apparet.* And

And as to Pleading Performance of the Conditions of Obligations, they do vary according as the ſeveral Caſes are. And,

Firſt, By 28 *H.* 8. *Dyer* 30. the Condition was, *That the Obligee ſhould peaceably enjoy, &c.* And the Defendant pleaded, That the Plaintiff did peaceably continue his Poſſeſſion, until ſuch a day, at which time the Lord diſtrained for Rent; and a good Plea. Conditions to ſave harmleſs.

But 30 *H.* 8. *Ibidem* 43. where the Condition was, to Warant and ſave harmleſs againſt Lord and King, and to have and peaceably Enjoy. The Defendant pleaded, *Quod habuit & pacifice gaviſus fuit*; where ſaid by divers, that the Plea is ill, and but Argumentative, that is, he hath peaceably Enjoyed the Land; *Ergo*, he hath Waranted the Land, and ſaved the Plaintiff harmleſs: For he might be Impleaded in a *Præcipe*, and the other not waranted, and yet hold it peaceably, or might be diſtrained for Iſſues loſt, &c. and therefore ought to have pleaded expreſly, *quod non fuit dampnificatus per Regem nec per aliquem alium*; or, that the Plaintiff was Impleaded, and he did warant, &c. *Quære inde*, for *Baldwin*, *è contra*.

The Condition of an Obligation (2 *Eliz. Dyer* 184.) was to warant, defend, or ſave harmleſs, as well the Perſon of the Obligee, as the Premiſſes, againſt one *Culpepper*; where the Defendant alledged in his *Bar* a former Leaſe, by reaſon whereof *neque le Obligee, nec les Premiſſes poſſint nec potuerunt eſſe dampnificat'*

nificat' per prædictum (Culpeper.) To which the Defendant *Replied* the Special Matter in Law, without Concluding, *Et iſſint dampnificat'*; where holden the Defendant's *Bar* was ill; and that he ought to have pleaded, *Non fuit dampnificatus*, or the Special Matter, and Conclude, *Iſſint non dampnificatus*; and the Plaintiff's *Replication*, for want of a proper Concluſion, *ill* alſo.

And 3 *Eliz. Ibidem* 186. in the like Caſe, the Defendant Pleaded, *quod Quer' non dampnificat' fuit per* A. and the Plaintiff in his Replication ſhewed a Special Damage, and Concluded, *Et iſſint dampnificat'*; and the Defendant by his Rejoynder pleaded, *Nul tiel Record*; *quod nota.*

Note alſo, That in an Action of *Covenant*, brought 28 *H.* 8. *Dyer* 31. One of the Covenants in the Indenture was, That the Defendant ought to make and ſuffer for the Aſſurance of the Plaintiff, all things that ſhould be deviſed by the Counſel of the Plaintiff, if he were required: And the Defendant taking *Proteſtation* for *Plea*, ſaid, that he was not required. To which the Plaintiff *Replied*, That *J. S.* was of his Counſel, who deviſed a *Releaſe*, which he required the Defendant to Seal; but he *refuſed* to do the ſame: To which the Defendant *Rejoyned*, *Que ne Refuſa pas*; and by *all the Court* holden a *Departure*, and that the Defendant ought to have Pleaded at firſt, *Non requiſitus fuit*; and the Plaintiff in his Replication needed not to have ſpoken of any *Refuſal.* But where the Condition was, for the

the Performance of an Arbitrement of *J. S.* touching, &c. ſo as it be delivered in writing before, &c.

The Defendant, *Mich.* 7 & 8 *Eliz. Dyer* 242, & 243. pleaded by Proteſtation *non fecerunt, &c. Pro Placito quod prædicti Arbitratores ante, &c. non deliberaverunt, &c.* Upon which the Plaintiff in his *Replication*, ſhewed when, and where the Arbitrators made the Arbitrement, and the ſeveral parts thereof, and alledged the *Breach* in one Point: Upon which Replication the Defendant did *Demur*; becauſe in his Plea he anſwered not the delivery of the Arbitrement, but by a glance, and not directly.

Note the words of the *Condition* and the *Plea*, notwithſtanding *quod Arbitratores non deliberaverunt, &c.* and good.

It appears by *Cro.* 2 Part, fo. 352. in the Caſe of *Staine* againſt *Wilde*, that where there was Debt brought upon an Obligation, to perform an Award of all Suits and Demands between the Parties, ſo as it be made of and upon the Premiſſes, ready to be delivered to the Parties before ſuch a day, &c. and that they made ſuch an Award *de & ſuper Præmiſſis*, *ſcil.* that the Plaintiff ſhould have and enjoy a Horſe in Controverſy between them, and that the Defendant ſhould pay him 3 *l.* before *Michaelmaſs* towards his Charges, and they ſhould Releaſe each to other all Matters whatſoever between that and *Michaelmaſs*. And the Plaintiff aſſign'd Breach for Non-payment of the 3 *l.* And on *Demurrer*, held good

for the Plaintiff. For tho' it was pleaded, That the Arbitrement was made *de & ſuper Præmiſſis*; yet theſe General words will not help the Plaintiff, unleſs he avers, that there were no more Cauſes between them, and then the Releaſe appointed being *void*, there is nothing Ordered for the Defendant's benefit.

See more of this 7 *H.* 6. 6. 39 *H.* 6. 9. 2 *R.* 3. 18. and 22 *H.* 6. 22.

So in *Tyer's* Caſe, *Trin.* 23 *Car.* 1. *in Banco Regis*, *Stile's Rep.* fol. 4. Where in Debt upon an Obligation to perform an Award made the 10*th* of *May*, ready to be delivered the 11*th* of *May*. The Defendant pleaded, *quod Arbitratores nullum fecerunt Arbitrium, &c.* To which the Plaintiff Replied, That the Award was made the 10*th* Day of *May*, ready to be delivered the ſame 10*th* day of *May*. The Defendant Demurred for *Duplicity* and *Departure*: Reſolved, Not: It being a thing whereof Iſſue is to be of the Award, and not of the Day of the Award.

But by 1 *Leon.* 71. in *Bret* and *Andrew's* Caſe, In Debt on an Obligation with Condition to perform an Award, which was, *To deliver up all the Houſes that he had.* The Defendant pleaded, That *he delivered up all, &c.* without ſhewing what they were, and Adjudged *ill*: And where it was Awarded, That *he ſhould diſcharge and ſave harmleſs* A. *from ſuch an Obligation*, he pleads, *Non dampnificatus*; and *ill* alſo: For he was not only to ſave him harmleſs, but to diſcharge him of the Bond, and both of them

them ought to be ſhewed, how done particularly.

So by 27 *H.* 6. 1. in Debt upon an Obligation with Condition to perform an Award; which was, *To Enfeoff, or Releaſe, or pay* 20 *s.* The Defendant pleads *Performance generally*, not ſhewing which of them he hath performed; and *ill.* For although Performance of any one of them would have been a good Excuſe, yet he muſt ſhew what he hath performed.

So *Bendloe's Rep.* 5. *A.* and *B.* were joyntly and ſeverally bound to ſtand to an Award to be made between them and *J. S.* The Arbitrators Awarded, that *A.* ſhould pay 30 *s.* to *B.* and that *B.* ſhould pay unto *J. S.* Ten ſhillings. In Debt on the Bond it will be no good Plea for *A.* to ſay, that he had performed the Award, without ſhewing in what manner it was performed; and likewiſe how *B.* had performed it, for he is bound to him alſo.

And in *Skinner* and *Andrews's* Caſe, *Hil.* 20 *Car.* 2. *in Banco Regis*, *Rotulo* 292. In Debt on a Bond, to perform an Award, *Ita quod* it be made before the 25*th* of *March*; where the Defendant pleaded, *Nul Arbitrement fait.* To which the Plaintiff Replied, that *ante viceſimum ſeptimum diem* Maii, the Arbitrators made an Award, and *good*, without ſaying, *Infra tempus limitat'*; for they may Traverſe *nullum Arbitrium, &c.* without Traverſing the Day, and if it be not before the Day, the Jury is bound to find it,

Note, by *Dyer* 75. *Kelway* 121. *Plowd.* 11. 19 *H.* 6. 37. there is a difference between *Arbitrement* and *Concord*: For an *Arbitrement* may be pleaded, tho' the time of Performance of it be not yet come; but a *Concord* muſt be Executed and ſatisfied before it can be pleaded; for there is no way to force the doing of it, as there is in Caſe of Arbitrement.

By *Bridgman's Rep.* 58. it appears, That if the Arbitrement be made of a thing ſubmitted unto, and of other things, it will be good for what is ſubmitted unto, and void for the reſt; and a *Breach* laid in that which was ſubmitted unto, will give good Cauſe of Action.

Vide Croke 3 *Rep.* 549. *Edwards verſus Marks*, in Debt upon an Obligation with Condition, *To appear in the Court of* King's Bench *(ſuch a day) and there Elect two Arbitrators, who (with two more to be Elected by the Plaintiff) ſhall Award, &c.* The Defendant pleaded, *That he appeared there at the Day, and there Elected two Arbitrators for himſelf; but that the Plaintiff was not there time enough for the Award to be made, nor had the Plaintiff his Arbitrators there*; and *good.*

But in the Caſe of *Corbet verſus Cooke*, *Cro.* 3 466. In Debt upon an Obligation with Condition, to appear in the Court of *Kings Bench* ſuch a day, &c. The Defendant pleaded, That the Court was Adjourned to *Hartford*, and that he appeared there, and Adjudged to be *ill*, becauſe he ſaid not *prout patet per Recordum.*

So

So in *Dighton* and *Clark*'s Caſe, 2 *Leon.* 199. Debt was brought upon an Obligation, the Condition whereof was, That *J.S.* ſhall not diſturb the Plaintiff in his Poſſeſſion, by any Indirect means. To which the Defendant pleaded, That he did not diſturb the Plaintiff in his Poſſeſſion by any Indirect means, but by due Courſe of Law; and Objected, the Plea *ill*, becauſe not ſhewed how by due Courſe, *viz.* what Suit: But Agreed, the Plea had been *good*, if he had only ſaid, *Not diſturbed by any Indirect means*; but doubted if not *ill*, becauſe he Pleads over by lawful Means, and ſays not what, ſo that it may be tryed.

So, by *Latch Rep.* 16. and 1 *Leon.* 136. In Debt upon an Obligation, with Condition *(inter alia)* for the Obligor to Account: To which the Defendant pleads, Conditions performed. The Plaintiff Replies, That the Defendant did not Account, and *ill*, becauſe he ſhews not what he had to account for: And difference is taken, when the Condition is in the Negative, *Not to do a thing*, then 'tis ſufficient to ſay, he did not do it; and when in the Affirmative, to do, as *to perform his Office*, or *to Enfeoff him of all his Land, &c.* there he might ſhew what his Office was, and what Lands he had, and that he did Enfeoff, &c.

Vide Mich. 2 *R.* 3. fo. 17. *Placito* 44. *& Trin.* 4 *H.* 7. *Placito* 6.

It appears by 9 *Ed.* 4. 12. and other Books, That if a Bar be good to Common Intent, it ſufficeth. Bar to Common Intent.

But by 22 *E.* 4. 83. If the Defendant pleads in Bar a *Record* or *Eſtoppel*, that muſt be certain and good to every intent.

And therefore in 21 *H.* 6. 1. the Defendant in *Maintenance* did plead, That the Party was his Servant, and that he did Retain *A.* to be of his Counſel; and, for the Reaſon aforeſaid, it ſhall be intended, that he retained him with his Servants Mony, and not with his own Mony; *quod nota.*

And by *Touchſtone of Precedents*, Tit. *Pleas and Pleading*, fo. 192. *Reg.* 7. a Bar may be good to a Common Intent, tho' not to every Intent; as if Debt be brought againſt five Executors, and three of them make default, and two appear and plead in Bar a Recovery had againſt them two of 300 *l.* and that they have nothing in their hands over and above that Sum. If this Bar ſhould be taken ſtrongeſt againſt them, it ſhould be Intended that they might have Abated the firſt Suit, becauſe the other three were not named, and ſo the Recovery not duly had againſt them; but according to the the Rule the Bar is good: For that by Common Intendment it will be ſuppoſed, that the two others did only Adminiſter, and ſo the Action well conſidered, rather than to imagine that they would have loſt the benefit and advantage of Abating the firſt Writ.

So by 3 *H.* 7. 2. *Plowd.* 26. *If a Bar have Matter of Subſtance in it, and be good to Common Intent, it is ſufficient, albeit it be not good to every Special Intent.* As where one Sues as Executor, and the Defendant ſaith, That the

the Teſtator made the Plaintiff and one *J. S.* Executors, and do not ſay after this That he did not make the Plaintiff Executor; yet this may be ſufficient. So in *Treſpaſs*, where the Defendant pleads, that the Place is his Freehold, this is *good*; yet the Plaintiff may have a particular Eſtate. So upon an Obligation to perform Covenants; the Defendant alledgeth two Covenants, and ſaith, he hath Performed them, and doth not ſay, There are no more Covenants in the Deed to be by him performed; yet this is *good*, for it ſhall be Intended that there are no more for him to perform.

But *Ibidem*, *No ſubſtantial part of a Bar may be omitted*: As, where one is bound to do a thing between ſuch and ſuch a time; and the Defendant ſaith, That he did it, or did it before the Day; this is not ſufficient, but he muſt ſhew, that he did it ſuch a Day within thoſe times. So if one ſaith, He was Lord of a Mannor, and entred for an Alienation in *Mortmain*, and do not ſhew that he did it within the Year; for this ſhall not be Intended, unleſs it be ſhewed.

Yet *per Plowden puis* 28. If one plead a Feoffment in Bar, it ſhall be allowed as *good*, albeit it might be by an Infant, or *per Dureſs*, *&c.* unleſs it be ſhewed on the other ſide. And if the Leſſor Covenants with the Leſſee, that if he be ouſted within the Term, that he ſhall have as much other Land, he muſt ſhew that he was Ouſted on ſuch a day in certain within the term.

So to plead in Bar, that *J. S.* died ſeiſed, and *R. S.* Entred as Son and Heir to him; this is *good*, tho' he ſay not that he was his Heir; for that ſhall be Intended, and the beſt ſhall be taken for the Defendant.

So *Ibidem*, in an Aſſize, if the Tenant plead in Bar a Diſcent to the Plaintiff, and two others, and that he hath the Eſtate of one of them; it is *good*, and yet he might have it by Diſſeiſin; but it ſhall be taken in the beſt Senſe, that he had it lawfully.

So *per eundem*, in *Colthirſt*'s Caſe, where the Anceſtor is *Tenant pur auter vie*, and the Heir pleads, that he Entred as Heir to him, and ſays not, that he Entred *firſt* after his death, for *Occupanti conceditur*.

And *Ibidem*, if a Leaſe be made to *A.* and *B.* for Life, the Remainder to *C.* and if *C.* ſhall dye during the Life of *A.* or *B.* then that it ſhall remain to *E.* for Life, *ſi ipſe vellet eſſe Reſidens, &c.* and *E.* (being Defendant) pleads his Entry, after the Death of *A.* and *B.* and *C.* and doth not ſay, when they died, nor when he entred; yet held to be *good* in a *Plea in Bar*.

For *per eundem* 32 & 33. if it be a Condition, it ſhall be Intended that the Defendant did Enter as ſoon as his Title accrued; and if the Caſe be otherwiſe in truth, than by Common Intendment it is taken to be, the Plaintiff muſt ſet it forth in his Pleading: As in a *Formedon in Diſcender*, if the Tenant pleads in Bar a Releaſe of the Demandant, without Waranty, it is *good*; and yet the Releaſe might be made by the Deman-

Demandant in the Life of his Father, and then it is no Bar to the Iſſue.

But it ſeems by *Brook*, in his Title of *Pleading*, 155. that in a Declaration or Replication this way of Pleading is not good: *For tho' a Bar may be good to Common Intent, yet a Declaration (and conſequently a Replication, or other Pleadings of the Plaintiff) ought to be good to every Intent.*

But by *Co. Lib.* 3. 52. If one declare upon an Eſcape in *London*, and the Defendant doth Juſtify by the Taking again of the Priſoner in another County, and anſwereth not the Eſcape in *London*; this will not be good, for every part of the Charge muſt be anſwered.

And Laſtly, It appears by *Hobart* 127, 128. that a Plea that hath ſome Matter of Law in it, tho' it ſeems to amount but to the General Iſſue, is always allowed.

Upon what Pleas the Plaintiff ſhall have preſent Judgment.

Note, *There be ſome Pleas in Bar, upon which the Plaintiff ſhall have Preſent Judgment.*

As 16 *H.* 7. 19. where in Covenant to *Perform Divine Service*; The Defendant pleaded, that *the Chappel was decayed.* So in *Curia Claudenda*, if the Defendant plead *Sufficient Incloſure*; or in *Warantia Chartæ*, *Nient Implede*; or in a Writ of *Meſne*, *Nient Diſtr'* in ſome Default; or upon the Plea of *Riens Arrere* in *Annuity*; or upon *Ne ſurcharga pas* in *Admeaſurement* of *Paſture*; or *Ne diſturba pas* in a *Quare Impedit*, *&c.*

In

In other Caſes the Plaintiff, upon the Defendants Plea, ſhall be barred for the preſent, and yet afterwards have the Effect of his Suit by Scire Facias, *or the like Proceſs upon that Judgment, or by New Action.*

As appears in 19 *H.*6.27. in Debt againſt an Executor, who pleads *Plene Adminiſtravit*, which is found for him, and ſo the Plaintiff is Barred *pro tempore*, *viz.* until *Aſſets* come afterwards to the Defendant's Hands, and then the Plaintiff may have a *New Action.* So in Debt againſt an *Heir*, who pleads *Riens per Diſcent*; or in a *Formedon* pleads the Waranty of his *Anceſtor* with *Aſſets*, and after the *Aſſets* are Recovered againſt him, he ſhall have a *New Formedon*; and if he Alien the *Aſſets*, his Heir ſhall have a *New Formedon.*

But as 21 *H.*7.10. where in *Formedon*, *Cui in vita*, *Mortdanceſtor*, and the like, ſuch a Plea is pleaded either againſt the Iſſue in Tail, or the Heir of Tenant by the Courteſy, &c. and no *Aſſets* found, and after *Aſſets* diſcend, the Defendant in the firſt Action ſhall have *Scire facias* for the *Aſſets*, if the firſt Action be a *Formedon*; otherwiſe, as it ſeems, for the firſt Land. *Quære.*

And ſee 11 *H.*4. and 4 *H.*6. *Bro.* Tit. *Scire fac'* 74, & 130. in the laſt of which it is doubted, when Executors plead *Fully Adminiſtred*, and it is found for them, and afterwards *Aſſets* diſcend; whether the Plaintiff be not driven to a *New Action*, or may have a *Scire facias* thereupon, *ſcil.* upon the firſt Judgment.

Which

Which ſeems not by the Books 40 *Ed.* 3, & 43 *Ed.* 3. abridged by *Brook* in Tit. *Scire facias* 17 & 29. where a difference is taken when the Plaintiff is Barred, and when he doth Recover.

In the next place ſhall be ſhewn, *How an Accord or Arbitrement is a good Bar.* Of Pleading *Accord*, or *Arbitrement.*

And for this ſee firſt 4 *H.* 7. 16. That in Debt upon a *Contract*, *Leaſe*, or *Arrerages of Account* before the Plaintiff himſelf, *Arbitrement* is a good Plea, (although the Demand be certain;) otherwiſe of *Arrerages of Account before Auditors*, becauſe it ſeems to be *Matter of Record*, and the Defendant cannot Wage his Law, *Qu.* then in Debt upon a Leaſe for years.

And 13 *Ed.* 4. 5. is, That an *Award* is no Plea in Attaint, or other Matter of Record; but if the *Matter of Record* be mixt with a *Matter en fait*, then it is a good Plea.

But in *Waſt*, as is 11 *H.* 7. 13. *Accord* or *Arbitrement* no Plea, becauſe the Action Mixt, nor in any Real Action; but in *Forger of Faits*, and other Actions upon Statutes, *Accord* or *Arbitrement* is a good Plea.

But 5 *Ed.* 4. 7. this difference is taken, that *Accord* pleaded is not good, without a Satisfaction executed before the Action brought, and that it muſt be Executed in the whole, and not in part; (as is 6 *H.* 7. 10.) But an *Arbitrement* is, without Execution, a good Plea, becauſe an Action lieth thereupon.

And

And therefore 19 *H.*6. 29. the Defendant did plead, That in Satisfaction he gave the Plaintiff a Pottle of Wine, and did not plead the ſame by way of *Accord, ſoy priſt.*

But ſee thereof more eſpecially for the Pleadings in the Books of *Entries.*

Where *Waranty* a good Bar.

And in ſome Actions, eſpecially Actions Real, the Waranty of the Anceſtor of the Plaintiff ſhall be a good Bar; but then the Concluſion of the Plea muſt be conſidered, which appears by the Books of *Entries* to be, *Si encounter le Garanty ſon Auncеſtor qui Heir, &c.*

But as it appears by 14 *H.* 4. and *H.*7. 12. and other Books in the Title *Garanty* in *Brook*'s *Abridgment*, the ſame by the better Opinion, is no Plea in Treſpaſs, until the Freehold come in debate.

Yet 21 *Ed.*4. 18. *Ibidem* 63. the Defendant in Treſpaſs did plead, That *J. S.* was ſeiſed in Fee, to whom the Anceſtor of the Plaintiff did Releaſe with Waranty, whoſe Eſtate the Defendant had, and Concluded *ut ſupra*; and there is no Queſtion made, whether that Plea might be in Treſpaſs; but whether he that made himſelf no Title, ſhall plead the ſame.

Notwithſtanding 20 *H.* 6. 20. in Treſpaſs upon the Statute of *Rich.* the Feoffment of the Anceſtor of the Plaintiff, with Waranty, holden *no Bar:* But there it is ſaid, That if the Defendant plead his Free-hold, the Plaintiff may have the Plea aforeſaid, and Conclude, *Judgment ſi encounter le fait ſon Anceſtor, &c.*

And

And 20 *H.* 7. holden *no Plea*, that the Plaintiff did Confirm to the Defendant Leſſee for years with Waranty; nor that in *Aſſize* by Tenant by Statute, the Waranty Collateral of his Anceſtor, a *good Bar*, becauſe but a Chattel demanded; yet there holden, that a *Ward* may be granted with *Waranty*, and the Voucher may be in a Writ of Ward.

And ſee 5 *H.* 7. 18. and other Books, in the Title of *Waranty*, and 22 *H.* 7. That a Sale of a Chattel, without Eſplees of Waranty, bindeth not the Seller to Warant, and that Waranty alſo muſt be made at the time of the Sale, and not after, and no advantage thereof to be taken by way of Bar, but by way of Action; *quod nota.*

Auterfoits Bar.

In the next place we ſhall conſider, where the Plea of *Auterfoits bar* ſhall be a good Bar, and where not.

And therefore for that, firſt ſee 12 *Ed.* 4. and *Bro. Action ſur le Caſe* 92, & 110. that *Ley gager* in Detinue, is a good Bar in an Action on the Caſe for the ſame Goods.

And by *Bryan* 2 *R.* 3. 14, & 19. in Account upon Goods delivered, it is a good Plea to ſay, That in Detinue before brought by the Plaintiff, the Defendant did Wage his Law.

And ſo ſeems 15 *Ed.* 3. *Fitz. Aſſize* 96. that in an Aſſize, a *Retraxit* by the Plaintiff in another Aſſize, is a good Bar: Otherwiſe of a *Nonſuit* by Experience; for until the Statute of *Second Deliverance* one might have one

one *Nonſuit* after another in Replevin *ad infinitum*; *quod nota.*

But if the Plaintiff be once barred by Judgment, in the ſame or in one of the like Nature, or in an Action of a higher Nature, he ſhall be alſo Barred in another meaner Action.

But as it appears in 14 *Aſſize* 6. the Uſing of a Writ of *Entry* is no Bar in a *Formedon*; nor in an *Aſſize*, to plead, That the Plaintiff had of this Land brought a *Formedon*; but the ſame is a good Plea to the Writ: And ſo is 4 *Ed.* 3. *Bro.* Bar. 61.

Recovery pleaded.

But, as it ſeemeth, to Plead a Recovery of the Land in queſtion againſt the Plaintiff, or one whoſe Eſtate he hath in the ſame, or higher Nature of Action, it is a good Bar, by many Books.

And 18 *Ed.* 4. 28. *Bro. Joynder in Action* 70. that in Treſpaſs upon the Statute of 5 *Ric.* 2. by three Perſons, a *Recovery* of a Third part of a Moiety againſt one of them, and *Execution* thereupon, a good Bar.

But, as it ſeems in 21 *H.* 6. 55. no Plea in Detinue of Goods to ſay, that before in *Detinue* and *Garniſhment* againſt him (the Defendant) he did Recover the Goods.

And 19 *H.* 6. 239. in an *Annuity* by *Preſcription* againſt a Parſon, who *Prayed in Aid*, and Traverſed the *Preſcription*, and found againſt the *Parſon*, and afterwards in a *Scire facias* he would have had the ſame Plea again, but could not, although all the firſt Jury were dead, becauſe it was his Default.

But

But see *Brook*, Bar 12. 20 *H.* 6. and 43 *Ed.* 3. in Debt, where said, *That if the Defendant plead a former Recovery by the Plaintiff in Plea Real, or Personal, without Execution, it is no Bar; because he that Recovered may at his pleasure bring a New Writ.* A former Recovery by the Plaintiff pleaded, no Bar, without Execution.

And so is 9 *Ed.* 4. 50. in *Trespass*; as likewise 4 *H.* 7. 7. where Three are bound joyntly and severally, but Execution is had only against one of them; yet this shall be a good Bar for the other two.

The next Thing observable in Pleading, is to know, *Where the Plea of the Defendants, or one of them, shall go to part, or to the whole.* Where the Plea shall go to *part*, or to the *whole*.

For which see first, 9 *H.* 6. 46. That if in a *Præcipe* against Two, One doth plead in Bar for his Part, and the other doth plead a Plea that goeth to the Whole, as *Bastardy*, *&c.* yet it shall not bar the Plaintiff against the other: But it is otherwise in a *Personal Action*, for there the Plea to the Whole shall be first Tried, and if found against the Plaintiff, shall serve for both the Defendants.

And by 31 *H.* 6. 23. If one pleadeth a Plea in Bar in an *Assize*, that goeth to the Whole, he may at his pleasure Conclude it but to the Moiety: Where it is said by *Prisot*, That *if one Pleads a good Matter in Bar, and Concludes to the Writ, it shall be taken in Bar.*

In

Of *Certainty in Pleading.*

In the next place we ſhall Treat of *Certainty in Pleading.*

And firſt, *Where the Defendant in his Bar, ſhall be forced to ſet down the Certainty of the Land, or give a Name to the ſame.*

For which ſee 5 *H.*7.28. in Treſpaſs of Goods, the Defendant did plead, that the Place was his Freehold, and that he took the Goods there *Damage feſant*; the Defendant was forced to ſet down the Land in certain, becauſe he made Title to the Goods; ſo if he makes Title to the Land by Feoffment: But otherwiſe, if he Plead meerly his *Freehold.*

And ſo is 22 *H.*6.24. in Treſpaſs: But ſee 5 *H.*7.28. that in *Forcible Entry*, becauſe the number of Acres is ſet down in the Declaration (as in a *Præcipe*, or in an *Aſſize*) the Defendant ſhall not in his *Bar* give the Land a Name, or other Certainty, but ought to Plead at his peril: But otherwiſe (according to the Ancient Practice) in *Treſpaſs* and *Replevin*; except (as before) where the Defendant pleaded his Freehold, and the Plaintiff did not ſet forth the Particulars of the Land in his Declaration, which he is now of late compelled to by Rule of Court.

But for the underſtanding of this and all other Matters relating to Practice, more fully and at large, ſee before in the *Introduction* of this Diſcourſe. And further, for *Certainty in Pleading*, take theſe General Obſervations.

Firſt,

First, see *Plowden* 32,65, 80, 81, 86, 191, 229. that which is alledged by way of *Conveyance* and *Inducement* to the Substance of the Matter, needs not to be so Certainly alledged, as that which is the Substance it self; as before, where a Lease is made to *A.* and *B.* for Life, the Remainder to *C.* and if *C.* die during the Life of *A.* or *B.* that it shall go to *E.* for his Life, &c. and *E.* in Pleading shews the death of *A.B.* and *C.* but shews no time of their Death.

And by *Plowden* 80, 121, 123, 126, 128, 129. that which a man cannot have Certain knowledge of, he is not bound to plead Certainly; nor to set forth that precisely that is out of his knowledge, or to which he is a Stranger, or by Common Intent he cannot see; as a Deed that belongs to another Man.

And by *Co. Lib.* 9. 108. that shall be said to be Certainly pleaded, which may be made Certain by Intendment, according to the Maxim, *Id Certum est, quod Certum reddi potest.*

But *Co. Lib.* 4. 97. and *Plowd.* 395. that is more Certain, which is Certain of it self. Yet, where the Defendant in Pleading makes Title to himself by a Lease, *Habendum*, for so many years as *J. S.* shall name, *Cum hoc*, that *J. S.* did name so many, there the Averment makes it Certain enough, and good.

So, many times when there is an Incertainty in a Case, by the addition of a Reference to a Certainty, it may be made good:

As *Perkins*, *Sect.* 36. an Eſtate is granted to *J. S.* the Remainder to him that ſhall come firſt the next Morning to *Pauls*, and one doth come there that is capable; this is a good Remainder, for it may be made Certain by Averment.

So, *Paſch.* 39 *Eliz. in B. R. Morgan* and *Johnſon*'s Caſe, one binds himſelf by Obligation to pay me all ſuch Sums of Mony as his Brother oweth unto me; this by Averment may be made Certain, and is good.

So, *Plowd.* 191. if one Grant his Mannors of *A.* and *B.* and ſay not in what Pariſh or County they are in; or make a Leaſe of all his Lands in the Pariſh of *A.* and ſays not in what County; theſe Grants in Pleading may be made good by *Averment*.

So, if the King by his Letters Patents grants to one all the Mannors and Advowſons that did belong to the Priory of *H.* or that were of *J. S.* who was Attainted: Theſe Grants by 32 *H.* 6. 20. and *Co. Lib.* 9. 47. may be made good in *Pleading* by *Averment*.

But by *Anderſon* 1 *Part*, 102. an Indictment was upon 8 *H.* 6. *quod intravit in unum Tenementum*; and held void for the Incertainty.

And *March* Rep. *Caſe* 168. in *Ejectione firmæ*, and *Not Guilty* pleaded, the Jury found them Not Guilty for part, and Guilty *in tanto ut Jus Meſuagii in Occupatione, &c. quantum ſtat ſuper Ripam*, and the Verdict was held void for *Incertainty*.

And

And ſo is 40 *Ed.* 3. 15. and *Co. Lib.* 9. 74. in Debt brought againſt Executors, who plead *plene Adminiſtravit*, and the Jury find they have *Aſſets*, but ſay not to what value; this is alſo void for *Incertainty*.

And by *Plowd.* 144, and *Co. Lib.* 10. 40. there muſt be a preciſe Affirmation of a thing in Pleading, where it relates to Matter of Subſtance; yet if the Pleading hit not the very Words, if it contain the Matter by neceſſary Implication, it may be good enough.

And by *Plowd.* 435. a man is not bound to one Form of Pleading, or to the Common Form, ſo he plead the Subſtance of the Matter.

And by *Hobart* 72, 78. 124. That need not be ſaid on the one ſide, that will come properly on the other.

And by *Plowd.* 104. 202. and *Co. Lib.* 10. 40. If a Plea hath two Intendments, the ſtrongeſt ſhall be taken againſt him that pleads it, and it ſhall be taken moſt for the advantage of his Adverſary: As, in a Releaſe pleaded to an Action of Treſpaſs, the time when it was made muſt be ſhewed, for it might be delivered before or after the Treſpaſs: and if not ſhewed when, it ſhall be taken to be before.

And, *Idem Lib.* 9. 109, 110. where *Covin* is alledged in the Avoidance of an Act, it will be ſufficient to ſhew it Generally, for it is ſecret and can hardly be known; and therefore a man ſhall not be forced in Pleading, to ſhew it exactly or certainly.

And by *Hobart* 163. General Iſſues may be pleaded without any Inducement.

Laſtly, By *Plowd.* 84. 63, 65. *Co. Lib.* 9. 109. *Dyer* 27. *Yelv.* 103. *Hob.* 258, 297. *Truth* and *Certainty* ought to be in Pleading; and therefore *Falſhood*, *Incertainty* and *Repugnancy* ought to be avoided in Pleading. And although, as hath been ſaid before, *Surpluſage* doth ſeldom hurt the Pleading; yet *Imperfect Pleading* is always dangerous.

Vide Brook's Abridgment, Tit. *Pleading* 94, 95, 96. 115. *Plowd.* 179. 229. 431. *Hob.* 23. 208. *Dyer* 27. and *Co. Lib.* 7. *Butt's Caſe*, for variety of Matter upon this Subject.

CHAP.

CHAP. III.

Of Replications, Rejoynders, &c.

Replication, Rejoynder, Sur-rejoynder, what.

After the Defendant has made his *Bar*, or *Plea*, that is to ſay, hath given in his *Anſwer* to the Plaintiff's *Declaration*, the next part of Pleading in Courſe muſt be the Plaintiff's *Replication*; which is an *Anſwer*, or *Exception* to the Defendant's *Plea*; and a *Rejoynder* is, where, after the Plaintiff in the Action hath Replied to the Anſwer of the Defendant, the Defendant doth again make Anſwer to the Plaintiff; and if after that the Plaintiff ſhall Anſwer again to the Defendant, ſuch Pleading is called a *Sur-rejoynder*.

As to *Replications* and *Rejoynders*, the Learning of them is more properly to be ſeen in every particular Action, under their reſpective Titles of Pleading; but touching ſome Particulars, we ſhall obſerve,

Where the Plaintiff is in a manner bound to anſwer the Defendant's Plea; yet, if he will, may Plead at large, without Anſwering the ſame.

Firſt, *Where the Plaintiff is in ſome ſort bound to Anſwer the Bar of the Defendant, but may notwithſtanding Plead at large, not anſwering the Bar; which is (in a manner) altogether in an Aſſize, where a General Bar, with Colour, is pleaded. And, by* 34 *H.*6.46. *not in Entry in nature of an Aſſize, nor other Action.*

And ſo is 21 *H.*6.18. and alſo 34 *H.*6.22, & 48. in *Treſpaſs*, and all other Actions (except

Aſſize,) where although the Bar be at large; yet the Plaintiff ought either to *Traverſe* it, or to *Confeſs* and *Avoid* the ſame.

Plea at Large, what.

Where it appeareth, that a *Plea at large* is, where the Plaintiff in his *Replication* medleth not with the Defendant's Bar: As to ſay, That a Stranger was ſeiſed, and did Enfeoff him; or, That his Father was ſeiſed, and died ſeiſed, and ſo he was ſeiſed until, &c. not ſhewing expreſly the Diſcent to be after the Defendant's Title.

And 38 *Ed.* 3. 10. the Defendant in Treſpaſs did plead his Freehold; and the Plaintiff *Replied*, *Que il priſt ſes arbres*, *priſt*, and could not, but was forced to make Title.

And 1 & 2 *Mariæ*, *Dyer* 171. the Defendant in a *Replevin* avowed, that *B.* was ſeiſed, and let to him for years; to which the Plaintiff Replied, that *antequam* B. *aliquid habuit*, *A.* was ſeiſed and let to *C.* whoſe Eſtate the Plaintiff had; and doubted, whether it were not a meer Title, as before at large, becauſe he doth no way encounter with the *Avowry*, nor *Confeſs* and *Avoid* the ſame, but only with the word *Antequam*.

Where alſo a Caſe is Vouched in 41 *Ed.* 3. how the Defendant in *Treſpaſs* did plead his *Freehold*; to which the Plaintiff Replied, *Que long temps devant le Defendant riens avoit en le Franktenement* J. S. *fuiſt ſeiſie*, *Et Leſſe a luy pur ans*, and ſo was he poſſeſt until, &c. and holden a *good Plea*.

But

But 3 & 4 *Mariæ*, *Dyer* 134. where the Defendant in Treſpaſs doth plead his *Freehold*, the Plaintiff is to *Traverſe* the ſame, or to Convey a Title to himſelf, and alledge a *Diſſeiſin* and *Regreſs*, and the Treſpaſs mean; *quod nota*, & *vide accordant* 34 *H.* 6. 32.

And by 42 *Ed.* 3. 2. the Defendant in Treſpaſs, for taking a *Ship*, pleaded the Gift of the Plaintiff; and the Plaintiff would have *Replied*, that he took his Ship *priſt*, and *ill*; and after would have added to that his Plea, *Abſque hoc*, that the Ship was the Plaintiffs *tempore doni*, and *ill* alſo; and laſtly would have pleaded, that *tempore doni* the Ship was to *Alice at Stile*, and was not ſuffered; wherefore he added to his Plea, that (after the Gift) *Alice* gave the ſame unto him, and ſo he took his *Ship*, and that holden a *good Plea*: And the Defendant *Rejoyned*, That it was the Ship of the Plaintiff at the time of the Gift.

And 49 *Ed.* 3. 19. the Defendant in Treſpaſs did *Preſcribe* in *Common*; to which the Plaintiff *Replied*, that the Place was his *Several*; *Abſque hoc*, that the Defendant had *Common* there: But where the Plaintiff in an *Aſſize* ſhall be forced to Anſwer the *Bar*, without making Title at Large. *Vide Bro. Abridgm.* Tit. *Aſſize*, *viz.* to every Special Bar.

And what ſhall be good *Replications* and *Titles*, further than hath been beforementioned, ſee the *Abridgments* of *Fitz.* and *Bro.* Tit. *Replications* and *Titles*, where the

ſame more plainly appears: As, if againſt an *Act of Parliament*, *Recovery*, or *Matter of Record*, the Title muſt be ſet forth *Specially*, and *de puiſne temps*; and ſo 10 *Aſſ.* 23. of a *Waranty*: But againſt a *Matter en fait*, the Plaintiff may well ſay, That after his Father was ſeiſed, and died ſeiſed, without ſhewing *coment*.

And as it appears by 47 *Ed.* 3. 13. *If the Title be before the Fine or Recovery, it may be general.*

And 18 *Ed.* 4. 10. the Defendant in *Treſpaſs* pleaded a *Gift in Tail* by the King; and the Plaintiff Replied, *Ne dona pas*; and good.

And 9 *Ed.* 4. 46. where the Defendant giveth to the Plaintiff a *Title*, and in his *Plea* deſtroyeth the ſame, That Matter the Plaintiff may Maintain, or Traverſe, without other or further Title.

And ſo is 40 *Ed.* 3. 5. and 3 *Ed.* 4. 18. where holden, that where the Defendant in Treſpaſs made *Title* by a *Gift in Tail* of a Stranger; the Plaintiff Replied, That he was ſeiſed until the Defendant did the Treſpaſs, and *Traverſed* the *Gift in Tail*; and good, although his Title was but of his own Poſſeſſion.

Where no need of Replication, or Rejoynder.

Next ſhall be ſhewn, *In what Caſes there is no occaſion either for Replication or Rejoynder.* And therefore,

Firſt, It appears by 2 *Ric.* 3. 9. that where Error is alledged, in that which the Courſe of the Court doth approve and allow of, there needs no Anſwer to the ſame.

And

And by *Littleton*, 12 *Ed.* 4. 13. where one doth Counterplead the Poſſeſſion upon a Voucher; or plead, *Quod partes ad finem nihil habuerunt, mes A. &c.* he ſhall add alſo, *Et hoc petit quod, &c.*

And ſo is 22 *H.* 6. *Bro. Replic.* 21. But 7 *H.* 6. 20. to the contrary in the Plea of *Partes ad Finem.*

But 31 *H.* 6. 21. as alſo 22 *H.* 6. and in all other Caſes where the Plea is in the *Negative*, as *Non Culp'*, *Ne dona pas*, *Ne unque ſeiſie que Dower*, *Nul Tort*, *Nil debet*, *&c.* Otherwiſe upon Pleas in the Affirmative.

But this Matter is more proper to be Treated of in the Title of *Iſſues.*

But by 2 *H.* 4. 4. where the Defendant in Debt did plead, that the Plaintiff had nothing *tempore dimiſſionis.*

And 11 *H.* 4. 79. where ſaid, that an Iſſue ſhall be always upon an Affirmative and Negative; except in Special Caſes.

Vide Dyer 2 *Eliz.* 182. the Tenant in *Formedon* by *Fiſh* to parcel, did plead one Fine, and ſo to the other parcel another Fine. To which the Plaintiff Replied, *Quod ſeperal' Fines minime proclam' fuerunt*; and good, although there ſaid, that it would have been better, to have made ſeveral *Replications.*

Where one Replication ſhall go to ſeveral Bars.

Then it is to be obſerved, where not only *Rejoynders*, but alſo *Surrejoynders* ought to be.

As 5 *Ed.* 4. 108. where in Debt upon an Obligation with Condition, for performing an *Arbitrement*, if the Defendant pleads, *Quod*

Quod Arbitratores non fecerunt, &c. And the Plaintiff doth ſay, *Priſt que cy*, that is *ill*; for he ought to ſhew the *Award* and alledge the *Breach*, and the Defendant muſt thereto plead, *That they made no ſuch Award*; to which the Plaintiff muſt ſay, *Priſt que cy*, and the Defendant Rejoyn, *Que priſt que non.*

And ſo you may ſee *Count*, *Bar*, *Replication*, *Rejoynder*, *Surrejoynder*, and *Rebutter* to *Surrejoynder* in Pleading.

Rebutter, what. A *Rebutter* is, where a man grants Land to the uſe of himſelf, and the Iſſue of his Body, to another in Fee with Waranty, and the Donee Leaſeth out the Land to a Third perſon for years, the Heir of the Donor impleads the Tenant, alledging the Land was in Tail to him; the Donee comes in, and by virtue of the Waranty made by the Donor, Repels the Heir, becauſe tho' the Land was Entailed to him, yet he is Heir to the Warantor likewiſe.

So, if I grant to the Tenant, to hold *abſque Impetitione Vaſti*, and afterwards Implead him for Waſt made, he may Debar me of this Action, by ſhewing my Grant; which is likewiſe a *Rebutter*. *Bro. Abr.* Tit. *Bar* 23, 25. *Nov. Lib. Intr. verbo* Rebutter, *Co.* 1 *Inſt.* 365. *a. Vide* 6 *H.* 7. 4.

But ſee hereof more properly in the Title of *Pleading*.

CHAP.

CHAP. IV.

Of General Iſſue, and Special Evidence.

NExt in Order, we will proceed to *Iſſues*. And,

Firſt, With thoſe that may be brought under the Diviſion of *General Iſſue*, and *Special Evidence:* In which we will ſet down the *Evidence* proper to the Nature of the *Iſſue*; and then, what *Special Plea* the Defendant may have, and not be forced to the *General Iſſue*.

The word *Iſſue* hath divers Applications in our Law; but that which concerns our purpoſe, is taken for that Point of Matter depending in Suit, whereon the Parties joyn, and put their Cauſe to the Trial of the Jury, and is an Effect of a Cauſe preceding; as the Point referr'd to 12 Men, is the Effect of Pleading or Proceſs.

Iſſue in this ſignification is either General, or Special.

General Iſſue is, where the Defendant makes a ſhort and peremptory Defence to the Plaintiff's *Declaration*, and is always in the Negative; as *Non aſſumpſit* to an Action upon the Caſe, *Nil debet* to an Action of Debt, and the like. And,

A *Special Iſſue* is that, where Special Matter being alledged by the Defendant for his Defence, both Parties joyn thereupon, and ſo

ſo it goes either to a *Demurrer*, if it be *Quæſtio Juris*; or to a Trial by the *Jury*, if it be *Quæſtio Facti*. *Anno* 4 *H.* 8. *cap.* 3. *Nov. Lib. Intration. verbo* Iſſue, *&* 18 *Eliz. cap.* 12.

But *Evidence* is taken for any *Proof*, be it Teſtimony of Men, Records, or other Authentical Writings of Contracts, &c. written, ſealed and delivered.

And it is called *Evidence*, becauſe thereby the Point in Iſſue is to be made *Evident* to the Jury: *Probationes debent eſſe Evidentes*, i. e. *Perſpicuæ & faciles*, *Co.* 1 *Inſt.* fo. 283. And,

Evidence upon *Non Culpabilis.* First, As to *General Iſſues*, we ſhall begin with the *Proper Evidence* upon the Plea of *Non Culpabilis*.

By 19 *H.* 8. 6. upon *Non Culpabilis*, it is no Evidence to ſay, that the Incloſure was defective, becauſe thereby the Treſpaſs is confeſt.

So, by 9 *H.* 7. 3. upon *Non Culpabilis* in *Reſcous*, the Defendant ſhall not give *Non Tenure* in *Evidence*.

And *Keilway* 59. upon *Non Culpabilis* in Treſpaſs, a *Licence* may not be given in *Evidence* to excuſe the Treſpaſſor, for this muſt be pleaded.

By *Co. Lib.* 10. fo. 56. upon the Iſſue, *Non Culpabilis* in *Trover*, it will be good *Evidence* to prove the *Converſion*, that the Plaintiff demanded the thing ſued for, and the Defendant refuſed or denied to deliver it.

And

And by *Plowd.* 14. the *Jury* may find him *Guilty* upon this; but being *Specially found*, the Court cannot do it.

And by *Hobart* 187. an *Unreaſonable Detainer* is good Evidence for this.

Vide Godbolt's Rep. 234. where in Treſpaſs for *taking away Timber, and the Boughs of Trees felled*, the Defendant pleaded, as to the Timber, *Non Culpabilis*; and to the Boughs, made a *Special Juſtification* by Cuſtom of the Mannor, that the *Lord* was to have the Timber, and the *Tenants* the Branches or Boughs for *Eſtovers*, to be burnt *in Terris & Tenementis Cuſtumar' Manerii:* And becauſe the Defendant did Entitle himſelf to a Houſe and Land, and gave the Cuſtom in Evidence for the Land only, it was held it did not maintain the Iſſue.

So, by *Stile's Rep.* 335. it appears, that where in an Action upon the Caſe the Plaintiff declared of a *Nuſance, viz.* that in ſuch a *Way* the Defendant had digged a Hole, *ratione cujus*, as he was Travelling in the ſaid Way with his Horſe, he did fall and hurt himſelf, &c. On *Non Culpabilis* pleaded, the Evidence was given, that the Plaintiff's Servant was driving his Maſters Horſe in the Way loaden with Lead, and by reaſon of this Hole he fell, &c. and it was held no *good Evidence* to maintain the Iſſue.

But by 18 *H.* 6. 22. where in *Parco fracto* the Defendant did plead *Non Culpabilis*, and gave in Evidence, That the Plaintiff had not a Park by *Preſcription*, nor by *Grant*; and it was held *good*.

By

Evidence for Abridgment of Damages.

By the Books 11 *H.*4. 24. and 19 *H.*6. 34. in *Treſpaſs* the Defendant may give in Evidence, That the Plaintiff hath part of the Goods again in Abridgment of *Damages*.

And by 3 *Ed.* 4. *Bro.* 67. that a Shop is parcel of the Houſe.

By 14 *H.*3. & 16 *Ed.*4. 1. upon this Plea the Defendant may give in Evidence a Leaſe; but by 25 *H.*8. *Bro.* 82. cannot give in Evidence a *Leaſe at Will*, no more than a *Licenſe*.

And ſo is 12 *H.* 8. 1. in *Waſt*, where ſaid, that in Waſt he cannot, upon *Nul Waſt fait* pleaded, give in Evidence, That he Cut the Timber for Reparations; nor upon *Non Culpabilis*, to give in Evidence *ſe defendendo*, or a *Licenſe*; but a *Gift* he may: But in Waſt he may *give in Evidence*, that the Premiſſes were ruinous at the time, or burned by Enemies, or the like.

But Title in an Eſtranger upon ſuch a Plea (as is the ſaid Book of 25 *H.*8. *Bro.* 81.) and to Juſtifie by his Commandment, is *no Evidence*; but ought to plead the ſaid Anſwer, as the *Licenſe* of the Plaintiff himſelf (as it ſeems,) or one pretendeth Common, &c.

But if the Defendant pretend an Intereſt from a Stranger in the Land it ſelf, although but an Eſtate at Will; yet he may plead *Non Culpabilis*.

Then

Then next, upon the Iſſue of *Nihil debet*.

What Evidence may be given upon the Iſſue of *Nil debet*.

By the Book of 28 *H.* 8. *Dyer* 29. the Defendant may give in Evidence, that the Contract was Conditional, or may plead the ſame, as appears there, without Traverſe: The like, as it ſeems upon *Non Aſſumpſit*, in Action upon the Caſe.

And 27 *H.* 8. 21. in Debt upon the Statute of 21 *H.* 8. of *Farms*, upon the General Iſſue, *viz. Non habuit, &c.* he may give in Evidence the taking for Proviſion of his Houſe, according to the Proviſo of that Statute.

And in 20 *H.* 6. 24. in Debt upon an Account, the Defendant may plead *Nul tiel Accompt*, or *Nil debet*, and give in Evidence, that there is no Account between the Parties.

And ſo is 9 *H.* 7. 3. in *Reſcous*, the Defendant ſhall not give in Evidence, *Non-tenure*; and yet may, upon *Nil debet*, give *Ne Leſſa pas* in Evidence.

But there, and 22 *H.* 6. 33. upon the Plea of *Non detinet*, the Defendant ſhall not give in Evidence a *Mortgage*.

Nor by 16 *H.* 7. 15. may he upon that Iſſue give in Evidence, that he had the thing of the Plaintiff as a *Pledge* for Mony not yet paid.

But *quære*, if he may give in Evidence an *Agreement* after the *Bailment*, that doth alter the Property.

And

Nota. And 21 *Ed.* 4. 20. *If the Plaintiff in his Declaration miſtake the Contract either in the Sum, or in the Thing ſold*, Nil debet *will be a good Plea.*

But 34 *H.* 8. *Bro.* 89. in Debt upon an Eſcape, if the Defendant plead *Nul Eſcape*, he cannot give in Evidence, *No Arreſt.*

Then upon the Iſſue *Ne Leſſa*, or *Ne Enfeoffa pas*, holden in *Fogaſſa's* Caſe, That upon the Iſſue *Ne Leſſa pas*, the Plaintiff ſhall not give in Evidence a Leaſe by Deed; but may a Leaſe Conditional, as on an Agreement Conditional.

And ſo is 14 *H.* 8. 17. the Parties being in Iſſue upon a Grant, *Evidence* was given of a Grant; ſo he obtained the Will of his Leſſor.

And 12 *Ed.* 4. 4. upon a Feoffment pleaded by Deed, Evidence cannot be given without, or by other Deed.

And 50 *Ed.* 3. 6. if a Demiſe to the Baron and Feme be pleaded, a Fine *ſur Releaſe* to them is no Evidence to prove the ſame.

And 18 *Ed.* 4. 29. if one plead *Ne Enfeoffa pas*, he may give in Evidence, that the Parties were Jointenants.

But 15 *Ed.* 3. *Bro.* 95. the Iſſue *Ne dona pas* may be Maintained by a *Deviſe:* And, as the *Books* are, upon a Feoffment, a Leaſe and Releaſe are good Evidence.

And by 1 *&* 2 *Mariæ*, *Dyer* 116. upon *Non dimiſit modo & forma*, one ſhall have advantage of the Date and Number of years.

Next,

Next, what Evidence ſhall be given upon the Pleas of *Non eſt factum, riens paſſa, &c.* *Non eſt factum, &c.*

Firſt, It is doubted 1 & 2 *Mariæ*, Dyer 112. that whether upon the Plea, *Non eſt factum*, the Defendant may give in Evidence, that the Plaintiff afterwards pull'd off the Seal.

But 15 *Ed.* 4. 18. upon *Non eſt factum* generally, he may give in Evidence, *Nient Lettered, &c.* *Minime Literatus,*

And ſo 14 *H.* 8. 28. upon Delivery, as an *Eſcrow.*

But 5 *H.* 7. 3, & 8. upon *Riens paſſa*, *Non eſt factum* it ſeems cannot be given in Evidence; *tamen quære.*

And Note, That in Actions of *Maintenance*, or other Actions upon the Statutes, in ſome Caſes the *General*, and in others the *Special Iſſue* ſhall be taken: For which ſee their proper Iſſues in the Nature of every Action.

And therefore, Firſt, in *Maintenance* it appears, by 28 *H.* 6. 6. that if the Defendant in *Evidence* ſhew a *Special Maintenance*, as ſworn in a *Jure Patronatus*, and the like, that will not ſtand with the *General Iſſue.*

But 22 *H.* 6. 35. upon the *General Iſſue* he gave in Evidence, That at the Requeſt of the Party he gave him Counſel to ſue out a *Superſedeas*, and *good*, becauſe *no Maintenance*; but in that Caſe, ought of neceſſity to plead the *General Iſſue.*

And if the Defendant in *Maintenance*, be charged with a Special Point of Maintenance, he muſt Anſwer to the ſame, and the *General Iſſue* then ſhall be no Plea for him.

And what be the *Proper Iſſues* in Actions upon the Statutes, ſee that Title in *Brook's Abridgment*; as in *Forcible Entry*, *Non ingreſſus eſt contra formam Statuti.*

But 3 *Ed.*4.1. doubted, whether he may not plead *Non Culpabilis* in Treſpaſs upon 5 *Ric.*2. and 1 *Ed.*5.4. In that Caſe the Plea of *Non Culpabilis*, admitted upon the Statute of 21 *H.*8. of *Farms* (as before-cited,) *Non habuit, nec, &c.* And upon the Statute of *Livery*, *Que ne dona pas les Robes*, and not *Non Culpabilis*; *quod nota*, and the like.

And it appears in *Dyer*, 3 & 4 *Mariæ* 145. that in Debt upon a *Pain* given by Statute, *Nil debet per Patriam*, is a good Plea: But there, and in 50 *Ed.* 3. doubted in Debt upon an *Eſcape* againſt a Gaoler.

And 18 *Eliz.* 346. in an *Information* upon the Statute of *Uſury*, *Non Culpabilis* a good Plea.

Hors de ſon Fee. Next, of the Plea of *Hors de ſon Fee.*

Upon which it ſeems, 27 *H.*8.20. that the *Avowant* giving in Evidence *Seiſin of Rent*, without a *Fealty*, not ſufficient.

And 10 *Ed.*4.10. if one plead *Hors de ſon Fee*, the other ſhall not ſhew a Tenure, *Et iſſint deins ſon Fee*; but, *Deins ſon Fee, priſt, &c.*

Then

Then of the Iſſue, *Ne unques Executor*, or *Pleinment Adminiſter*, where 'tis holden, 9 *H.* 7. 14. that upon either of theſe Pleas, if the Plaintiff doth Reply, *Aſſets*, or, *that he did Adminiſter*, he need not ſhew what Aſſets, or what thing he did Adminiſter ſpecial.

Ne unque Executor, or *Pleinment Adminiſter*.

And 9 *Ed.* 4. 40. upon the Plea of *Ne unques Executor*, the Defendant may give in Evidence, *that he is Adminiſtrator*, or, *that the Goods were given him in another County*; which the Jury are bound to find. The like of *Aſſets* in any other County, given in Evidence.

And 3 *H.* 6. 3. where the Iſſue upon *Aſſets in mains del Executor*, it is good Evidence for the Plaintiff to ſay, *that he ſold the Land by the Appointment of the Teſtator, &c.*

And where the Iſſue is upon *Preſcription*, by 34 *H.* 6. 36. if the Plaintiff give in Evidence a *Deed within time of Mind*, the Defendant may Demur upon the Evidence.

Iſſue upon *Preſcription*, or *Cuſtom*.

Demur upon *Evidence*.

Otherwiſe by 12 *H.* 4. 24. if the Deed be *time out of Mind*: For ſuch a Deed, although it were the Kings Patent, cannot be pleaded.

And 4 *&* 5 *Mariæ*, *Dyer* 164. if one Preſcribe for *Common Appurtenant* to two ſeveral Houſes, for twenty Beaſts, and give in Evidence, *that he hath Ten to either Houſe*, the *Iſſue fails*.

So, if he *fail* of his *Proof* in the ſame Nature his Plea is, it is *ill*.

As 1 & 2 *Eliz. Dyer* 192. Iſſue was taken upon the *Cuſtom* of a *Mannor*, relating to a *Copyhold Eſtate*, whether the *Widow* ought to hold *for Life*, and the *Evidence* proved only *during her Widowhood*; and ill; *quod nota.*

So, by *Co.* 1 *Inſt.* 283. if in Debt upon an Obligation the Defendant plead *Non eſt factum*, and give in Evidence the *Bond* is Joynt and not Several, this is ill, and will be no good Evidence; but if pleaded Specially, would have barred. Or, if in an Aſſiſe *Nul tort* is pleaded, and a Releaſe after the *Diſſeiſin* is given in Evidence.

So, by *Keilway* 55. where the Iſſue in Treſpaſs, for *Aſſault and Battery*, is *Not Guilty*, and the Defendant gives in Evidence *ſon Aſſault demeſne:* The Evidence in none of theſe Caſes will be good.

But by *Co. Lib.* 5. 119. & *Lib.* 11. 27. if in Debt on an Obligation the Defendant plead *Non eſt factum*, and upon Trial gives in Evidence, That the *Seal* of the Bond was broken off, and put on again; or, That any part of it was Raz'd; it will be a good Proof to bar the Plaintiff.

And *Idem*, 1 *Inſt.* 283. if the Point in Iſſue be upon a Tranſitory Treſpaſs, done at a day or place certain, and the Proof given is, That it was done at another day before, or at another place; this is good enough: But otherwiſe it is, where the Proof is, that it was done at a time after the Day laid in the Declaration.

So

So, by *Plowd.* 8. if the the Point in Iſſue be a bare Agreement, or ſimple Contract, without any Complex Matter, and the Evidence prove it to be an Agreement Special; this will be good. So if it be of a *Feoffment Abſolute*, and the Proof be of a *Feoffment Conditional.*

And by *Co.* 6. 47. if in a Suit againſt an Executor or Adminiſtrator, the Iſſue be *Aſſets* in *London*, the Proof of Aſſets in any place in the World beſides, will be ſufficient to maintain it.

So *Dyer* 271. and *Crompt. Juriſdiction of Courts* 12. if it be in caſe of Heir, on an Action grounded on a Specialty againſt him, and the Point in Iſſue be *Aſſets by Diſcent*, it will be ſufficient if he can prove *Aſſets* any where in *England*: And if it be Aſſets in one County, it will be ſufficient to prove Aſſets in another County.

And by *Brownlow's Rep.* fo. 233. Part 1. If there be two Batteries made between the Plaintiff and Defendant at ſeveral times, the Plaintiff to maintain the Iſſue, muſt prove the Battery made the ſame day he hath laid it in his Declaration, and ſhall not be admitted to give another Day in Evidence.

And now in the next place we will ſhew, *Where the Defendant may Traverſe any part of the Plaintiff's Conveyance of his Action, and not be forced to the General Iſſue.*

Where the Defendant may *Traverſe*, and not be forc'd to the *General Iſſue.*

For which ſee, firſt, 2 & 3 *Mar. Dyer* 121. where the Lord *Mountegle* brought an Action

upon the Caſe for a *Chain of Gold*, upon a *Trover* againſt the *Counteſs* of *Worceſter*, ſuppoſing that he was poſſeſs'd, and loſt the ſame, which came to the Defendant's hands, who ſold the ſame to Perſons unknown. To which the Defendant did plead, *Quod non vendidit, &c. Modo & forma, &c.* and ſeems good, becauſe a principal part of the Declaration; and although but *Conveyance*, yet becauſe he cannot *Wage his Law*, he may have this *Traverſe*. As the Defendant in Debt upon a *Leaſe for years* may plead *Non dimiſit:* And ſo in Debt upon *Arrerages* before *Auditors*, may plead *Non Computavit.*

But as 22 *Ed.*4.29.in Debt upon an Award *Nul tiel Arbitrement*; in Detinue upon a Bailment *Ne baila pas*; or in Debt upon a Contract *Ne achata pas*, no Plea; becauſe the Defendant may Wage his Law: And ſo the Defendant may plead *Non ejecit, Non rapuit, Non manutenuit, Ne forga pas, &c.* or *Non eſt Culpabilis modo & forma*, at his pleaſure.

But 28 *H.*8. *Dyer* 26. *Non dampnificatus* no Plea in Action upon the Caſe; and holden lately, by better Opinion, That a *Converſion* in an Action upon the Caſe (for a *Trover*) ſimply, is never Traverſable; but by an *Alio modo*, as a Licenſe to uſe the ſame, &c. *quære inde.*

And 18 *H.*6. *Bro.* 94. in an Action *De Parco fracto*, the Defendant cannot plead, that it is *no Park.*

But

But 12 *Ed.* 4. 7. in Treſpaſs by a *Prior*, *Warden* or *Sheriff*, or by one for the Taking away of his Servant, a *good Plea* for the Defendant to ſay, that the Plaintiff was *no Prior*, *no Warden*, or *no Sheriff*, or that the Party *was not* Servant to the Plaintiff.

And yet in 11 *Ed.* 4. 4. if the Feoffment of the *Maſter* and *Brethren*, or of the *Father* be pleaded, it is no Plea to ſay, that there are *no ſuch Brethren*, or that there is *no ſuch Father*, but muſt plead *Non eſt factum*; for the other Pleas are but Argumentative.

Then ought to be known, *Where the Defendant ſhall be forced to the General Iſſue, or may Traverſe the Place laid by the Plaintiff in his Declaration.*

For which ſee 4 *H.* 6. 13. as Abridg'd by *Bro.* Tit. *Traverſe*, where in Treſpaſs laid in **Dale**, the Defendant doth Juſtifie in **Sale**, *Abſque hoc quod ipſe eſt Culpabilis de aliqua Tranſgreſſione in* **Dale**; and the Plaintiff driven to Anſwer to the ſame, and the Defendant not enforced to the *General Iſſue.*

And ſo is 12 *Ed.* 4. 19, & 39.

But 9 *H.* 6. 62. and 14 *H.* 6. 23. the Defendant in that Caſe *forced* to the *General Iſſue*, and the Jury bound to find it upon Pain of *Attaint.*

But in the laſt recited Book, *viz.* 14 *H.* 6. that the ſame is according to the Diſcretion of the Court.

And 28 *H.* 8. *Dyer* 19. *Fitz.* againſt *Baldwin*, that the Defendant may have the Plea, where he ſaid, That *Baldwin* ſpake for ſparing of Parchment.

And 22 *H.* 6. 26. where, by his Juſtification in another County, he is driven to the *General Iſſue.*

Where the Defendant may plead *Specially*, and not be forced to the *General Iſſue.*

Then we ſhall Conſider, *In what other Caſes the Defendant may plead Specially, and not be forced to the General Iſſue.*

For which we muſt firſt Conſult 9 *H.* 6. 11. where it is ſaid, that the Defendant in *Treſpaſs of Goods* pleaded, that *A.* was poſſeſſed, and gave them to him, *without that*, that he took any Goods of the Plaintiffs; and nothing Entred, but the General Iſſue.

Vide 21 *H.* 6. 13. where the Special Matter did amount but to the Traverſe of the *Seiſin*; yet the ſame was Entred, for there ſaid to be done or not at the Diſcretion of the Court.

So, by 22 *H.* 6. 17. upon Nontenure the Plaintiff Averred the Tenant *Pernour of Profits*, and the Tenant ſhewed how his Pernancy was a Rent reſerved upon a Leaſe for Life, *Abſque hoc, &c.* and ſuffered.

And 9 *Ed.* 4. 30. a Servant retained, taking yearly Twenty ſhillings, or a Robe; the Defendant in Debt pleaded, that he had paid the Robe; and good, by the better Opinion.

And 34 *H.* 6. 43. the Defendant in Treſpaſs of *Warren*, did plead the Freehold in *John S.* and that he by his Commandment did

did the Treſpaſs, and enforced to the *General Iſſue.*

And 21 *Ed.* 3. 30. in *Detinue* of an Obligation of 20 *l.* the Defendant ſaid, That an Obligation of 30 *l.* was delvered to him; *Abſque hoc, &c.* and ſuffered.

And 11 *H.* 6. 35. in Debt againſt an Executor the Defendant pleaded, that the Teſtator gave him all his Goods, except ſuch, and to the reſidue *plene Adminiſtravit*; and ſuffered.

And 5 *H.* 7. 3. in Treſpaſs of his Servant, the Defendant may plead, that *he was not Servant.*

And 39 *Ed.* 3. 19. in Treſpaſs by a *Biſhop*, the Defendant pleaded, that he did it when the Temporalties were in the King's hands; *Abſque hoc*, that he was *Culpabilis* before; and good.

And 22 *Ed.* 4. 45. the Defendant in *Falſe Impriſonment* pleaded, That his Maſter did Impriſon the Plaintiff in a Chamber, and gave him the Key to keep, and becauſe the Plaintiff was a Clerk of the Court, the Defendant was forced to the *General Iſſue.* *Nota.*

And 14 *H.* 6. 2. the Defendant, in the like Action did plead, *that*, by agreement of the Plaintiff, *he did lead him to* Dale; and forced to the *General Iſſue.*

And 21 *H.* 6. 39. the Defendant in Treſpaſs did plead, That the Plaintiff did Command his Servant to put in the Defendant's Beaſts, and that the Defendant, when he had Notice, put them out; and good.

And

Aud 39 *Ed.* 3. 15. the Tenant in Dower did plead, that the Demandant had an *Eign Baron* in Life, *Et iſſint nient loyalment accouple*, and nothing Entred but *Nient loyalment accouple.*

And ſo, 19 *H.* 6. 17. if the Defendant plead *Baſtardy*, and the Plaintiff Replies, that he was born in *Eſpouſals*, *Et iſſint Mulier*, nothing ſhall be Entred but *Mulier.* The like of the Pleas of *Ne unques ſeiſie que Dower.*

Yet 39 *H.*6. 9. the Tenant was admitted to plead, That he Let to the Plaintiff's Huſband, at Will, which ſo continued; *Abſque hoc, que ſeiſie de tiel Eſtate que Dower*; and ſo may the Defendant in Debt plead Generally, *Non eſt factum*, or that he is Unlettered, &c. and ſo Conclude, *Non eſt factum.*

And, 11 *H.* 4. 83. in the like Caſe, the Defendant did plead, That the Baron of the Plaintiff nothing had but in * Jointure with *A.* To which the Plaintiff Replied, That *A.* did Releaſe, and the Court did perſuade her to plead only *Seiſie que Dower.* And in Dower of Rent the Defendant did plead, *Ne unques ſeiſie:* To which the Plaintiff Replied, That the Rent was granted payable at *Michaelmaſs*, before which day her Huſband died, *Et iſſint ſeiſie que Dower*, and the Special Matter ouſted.

* *Scil.* Jointenancy.

And 21 *Ed.* 4. 22. the Tenant in Dower did demand the *View*, which the Demandant did Counterplead, for that her Huſband died ſeiſed, and the Defendant forced

to

to the *General Iſſue*, without ſhewing Matter of an Eſpecial Tail.

See more hereof in the Title of *Traverſe*.

In the next place we ſhall Cite ſome Cales, additional to the former, to ſhew, *Where the Evidence doth ſtand with the Iſſue, and where not.* Evidence agree, or diſagree with the Iſſue.

For which ſee firſt, 30 *H.* 8. *Dyer* 41. upon the Plea of *Ne unques ſeiſie que Dower*, the Defendant ſhall not give in Evidence *an Eſtate upon Condition*, or *other Eſtate in the Husband, defeated by the Remitter of the Heir*, or the like.

And 1 & 2 *Mar. Dyer* 112. the Defendant, upon *Non eſt factum*, gave in Evidence, That the Plaintiff afterwards pull'd off one of the Seals of the Obligation; and Doubted.

And 3 *Eliz. Dyer* 192. upon the Plea of *Ne unques ſon Baily pur Accompt render*; the Defendant ſhall not give in Evidence, That according to the Bailment he did deliver the ſame over; nor is the ſame Plea good before Auditors; *quod nota.*

And 5 *Eliz. Dyer* 222. if the Defendant in Debt upon an Obligation, plead the Payment at the Day, he cannot give in Evidence an Acceptance of the ſame, or other thing in lieu thereof before the day.

And 10 *Eliz. Dyer* 276. upon *Nul Waſt fait*, the Defendant ſhall not give in Evidence, That the Premiſſes were amended before the Action brought; and yet ſee before,

before that, to ſay, *they were Ruinous at the time of the Leaſe*, and the like, ſhall be good Evidence in this Caſe.

And 10 *Eliz. Dyer* 272. in Debt againſt an Heir, who pleaded *Riens per diſcent*; the Plaintiff Replied, *Aſſets* in *London*, and gave in Evidence *Aſſets* in *Cornwal*; and Doubted: But clear of Aſſets of Goods.

Where 21 *Ed.* 3. is Vouched, That where Iſſue is upon *Tender of Homage in a Foreign County*, they cannot find the ſame Tender in the County where the Land is; but may in any other Place, in the ſame County where it is alledged to be Tendred; *quod nota:* Where it is alſo ſaid, that Aſſets alledged in *Dale*, *& alibi in Com.* C. all the ſame muſt be Traverſed.

And yet 13 *&* 14 *Eliz. Dyer* 305. in the Caſe of an Obligation made in *Ireland*, in Debt againſt the Obligor in *London*, Iſſue was taken, If the Obligation at the time of the death of the Obligee were then in *London*, *viz. in Parochia beatæ* Mariæ, when it was in the ſame Ward, but not in the ſame Pariſh, and therefore *ill:* But ſee more of this in this Title, in the ſeveral Titles before and after.

Evidence ſufficient for the Jury to take Cognizance of.

Then alſo further than before is declared, ſhall be ſhewn, *What is ſufficient Evidence, that the Jury ſhall be obliged to take Cognizance of.*

And therefore, firſt, ſee 9 *Ed.* 4. 40. where, upon the Plea of *Ne unques Executor*, if the Defendant give in Evidence a *Gift*, or *Releaſe*

leaſe in a *Foreign County*, the Jury are bound to take Notice thereof upon pain of *Attaint*: Where ſaid alſo, That if the *Miſe* be joyned in a Writ of *Right*, the *Grand Jury* are bound, upon Pain of Attaint, to find a *Releaſe*.

And ſo is 40 *Aſſ.* 23. and *Brook* in this Title 33. in *Rediſſeiſin*, becauſe but an Inqueſt of Office, and a Releaſe not pleadable in thoſe Actions.

But by 43 *Aſſ.* 41. *a.* Releaſe in an Aſſize cannot be given in Evidence; otherwiſe of a *Feoffment*. But *Littleton* is of Opinion, that the Jury may, if they will, upon the General Iſſue, find a *Condition* broken, or a *Releaſe*, as it ſeems, that doth Extinguiſh Right, although they may not be forced thereto upon pain of *Attaint*.

And ſo it appears 22 *Ed.* 4. 19. That in *Decies tantum* the Jury are not bound to find a *Taking* in a *Foreign County*, although they may, if they will; but if they find it by Expreſs words, then the *Verdict* is alſo ill: And ſo of *Aſſets*, and ſuch Things Tranſitory; but otherwiſe of Local Treſpaſſes.

And 4 *Ed.* 4. 1. in a Writ of *Entry*, in Nature of *Aſſize of Common*, the Plaintiff gave a Preſcription in Evidence, and good; becauſe in this Action, as in an *Aſſize*, there is no Title laid in the *Count*.

And 7 *Ed.* 4. 16. where *Divorce* or *Reſtore* pleaded to the Writ, the ſame may be given in Evidence.

And

And it ſeems by 3 *H.* 6. 33. That where a Matter in Law is given in Evidence by one, the other may Demur.

What Writings the Jury ſhall take notice of, or may be delivered unto them.

Next, we ſhall Obſerve, *What Deeds and Writings are ſufficient Evidence, ſuch as the Jury are to take notice of, or ſhall be delivered unto them.*

Rules.

Firſt, It appears 11 *H.* 4. 17. and there laid down as a *Rule*, That no *Deed* or *Writing* whatſoever, ſhall be privily or ſecretly delivered to the Jury, that was not openly ſhewed.

And, by 11 *Ed.* 4. 25, & 38. That an Office before an *Eſcheator*, unleſs Exemplified, not to be delivered to the Jury, no more than a *Teſtimonial*; nor, by that Reaſon, the Jury bound to Credit the ſame.

And 34 *H.* 6. 25. a Part of a *Fine* Indented, unleſs Exemplified, not to be delivered to the Jury, but with the Conſent of both Parties.

No more ſhall any Copies of Books, by 9 *H.* 6. 6. But a Part of a *Fine*, not Exemplified, delivered in Evidence, (as in *Newſe* and *Scholaſtica*'s Caſe) or any other Evidence, that they are not bound to take notice of, they may yet, at their pleaſure, reſpect in their *Verdict*, or find the ſame Specially.

But 7 *Eliz. Dyer* 239. doubted, where the Jury may find a Private Act of Parliament, not delivered to them in Evidence, Exemplified, or otherwiſe.

And

And the Matters aforeſaid (as it ſeems) are no Cauſe to Demur upon the Evidence, no more than in *Fogaſſa*'s Caſe, becauſe but one Witneſs; for that the Jury may, upon their own Knowledge, give a *Verdict* without Evidence: Nor in any Caſe may one Demur upon Evidence, unleſs he will admit the Evidence to be true: Nor without the Conſent of the other Party (as it ſeems,) which, according to the Opinion of many, may put himſelf upon the Jury to find a *Verdict*, which they may do either Generally or Specially, at their pleaſure; which, if they do Specially, they avoid all occaſions of Attaint. Demurrer upon Evidence.

See for *Demurrers in Evidence* the Books following, *viz.* 9 *H.* 6. 33. where it is ſaid, That upon a Matter in Law, the other Party may Demur in Law, for it belongs not to the Lay-Jury to Judge thereof; but that, it ſeems, ought to be ſuch a Matter that the Judge muſt take to be doubtful.

And ſo in the before-cited Caſe of *Fogaſſa*, That the King's Attorney did Demur upon the Evidence, and that (as it there appears) whether the other would agree, or not: But whether ſo in *Newſe* and *Scholaſtica*'s Caſe, *quære.*

And ſee the Book of 34 *H.* 6. 36. where the Plaintiff in Annuity, by *Preſcription*, ſhewed a Deed, in Evidence, within time of Mind; and the Defendant prayed, That the Evidence might be Entred, and he would Demur upon the ſame, and the Plaintiff would

would not agree to it; *quod nota.* But if the Court think the Evidence good, the other ſide may (as in *Tatam*'s Action upon the Caſe 27 *H.*8.) deſire the Juſtices to Seal a *Bill of Exception*, which in the *Writ of Error* he may alledge, and not in *Arreſt of Judgment, ex Rigore Juris.*

Bill of Exception.

And ſee *Dyer*, 6 *H.* 8. 2. where in *Debt* againſt an *Executor*, the Defendant did plead *plene Adminiſtravit*, and gave in Evidence a Redemption of a Pledge with his own Mony, upon which the Plaintiff did Demur, and by Aſſent of both Parties the Jury was diſcharged; *quod nota.*

And ſo ſeems Experience at this day, that in Demurrer on Evidence the Conſent of both Parties is requiſite.

CHAP.

CHAP. V.

Of Special Issues, and manner of Joyning them.

IN the next place we shall Observe, the *Manner and Form of Joyning other Issues,* (that is to say) *Special, being such as are different from the General Issues, we have already treated of, in respect of the Special Matter contained in them.* Of Special Issues, and the manner of Joyning them.

And, First, by 26 *H.* 8. 3. if the Issue be joyned on the Defendant's part, then must it be, *Et de hoc ponit se super Patriam*; but if upon the Plaintiff's part, then in this manner, *Et hoc petit quod inquiratur per Patriam*; and so is *Dyer* 18 *Eliz.* 253.

But then it ought to be known, as that which is very Material in Pleading, *which of the Parties, in their Pleas, shall first Offer the Issue*; where holden generally in that Title in *Brook*, *That he which Pleadeth the first Negative, shall* (as before) *Conclude the Issue.* Which of the Parties shall offer the Issue.

And yet *Ibid.* 2 *H.* 7. 4. the Defendant in Debt upon a Lease did plead, That the Plaintiff, *Riens ad tempore dimissionis*, without such Conclusion; and the Plaintiff said, That *J. S.* did him Enfeoff, *Et sic ussoit, &c. Et hoc petit quod inquiratur per Patriam.*

Rule. And *Ibid.* 11 *H.*4.19. *Iſſue* ſhall be always Joyned upon a *Negative*, after an *Affirmative* alledged before; or, *è contra.*

Rule. And *Ibid.* 9 *Ed.*4.36. If the Defendant do plead in the *Negative* to the Writ, the Plaintiff ſhall Reply in the *Affirmative*, and Conclude the Iſſue.

Rule. And *Ibid.* 7 *H.*6.43. It appears, That if the Plaintiff declares in the *Negative*, (as in *Diſceit*, That the Defendant did Sue the Plaintiff in Debt in the Name of *N. abſque voluntate ſua*) it ſufficeth for the Defendant to ſay, *Que il ſua per ſon Aſſent, Et de hoc ponit ſe ſuper Patriam*; *quod nota.*

Rule. And *Ibid.* 19 *H.*6.1. the Defendant did plead to the Writ, *That he was abiding at Dale*; and no Plea, without ſaying alſo, *and not at* B. as the Plaintiff did Name him; becauſe the Iſſue ſhall always be upon a *Negative.*

Rule. And there it appears, that one of the Defendants in Treſpaſs pleaded, *That one of his Companions was dead the day of the Writ purchas'd*; no Plea for the Plaintiff to Reply, *Que il fuiſt en vie al* Dale, but muſt alſo ſay, *Et nemy mort*; *quod nota.* As to ſay, by way of Replication, in the like Caſe, *Mulier & nient Baſtard*, or *Frank & nient Villein, Et hoc petit quod inquiratur per Patriam*; *quod nota.*

And ſo 11 *H.*4. 90. the Defendant pleaded the *Freehold of* J. S. *&c.* and the Plaintiff Replied, *that it was his Freehold*; he muſt ſay alſo, *Et nemy le Franktenement* J.S. or, *Abſque hoc que eſt le Franktenement* J.S. *&c.*

And

Rule.

And it appears 18 *Eliz. Dyer* 353. That he who taketh the Traverſe by *Abſque hoc*, ought not properly to Conclude the Iſſue; but the other Party, beginning his Plea with *Ut prius dicit, &c.* may.

It appears alſo by 33 *H.* 6. 22. That he who pleads, *Partes ad Finem nichil habent*, or doth Counterplead the Poſſeſſion, or pleads *Ne unque ſeiſie que Dower*, *Ne dona pas*, *Nul Tort*, *Non Culpabilis*, and the like; becauſe theſe Pleas be in the *Negative*, he ſhall Conclude with the Iſſue, *Et de hoc ponit ſe ſuper Patriam.*

But 12 *Eliz. Dyer* 290. in the Plea of *Partes ad Finem, &c.* the Party that did plead the ſame had his Election to Conclude the Iſſue, or not.

See alſo 2 & 3 *Mar. Dyer.* 121. That where the Defendant did plead in the *Negative*, (as in an *Action upon the Caſe*) he did Traverſe the Sale, and did not Conclude, *Et de hoc ponit ſe ſuper Patriam*, but with *Unde petit Judicium ſi prædictus Quer' Actionem ſuam prædictam verſus eum habere debeat, &c.* and yet good; becauſe a *Perfect Iſſue* may be Joyned thereupon; *quod nota.*

Nevertheleſs, *in ſome Caſes*, *Iſſue ſhall be taken upon* Affirmatives, *without* Negatives.

Where Iſſue ſhall be taken upon *Affirmatives* only, without *Negatives.*

As 6 *Ed.* 4. 6. Where the Defendant in *Replevin* doth Avow, as within his Fee: The Plaintiff may Reply, *Hors de ſon Fee, priſt.*

And ſo in Debt againſt an Executor, who pleads *Pleinment Adminiſter*; and the Plaintiff Replies, *Aſſets*.

And in a Writ of *Right* the Tenant pleads, *That he hath better Right, &c.* and the Plaintiff Replies, *That he hath better Right to Demand, &c.* which is ſomewhat doubted in 32 *H.*6. 25. touching the Plea of *Hors de ſon Fee*.

Of *Tender*, or *Refuſal*.

Next in Order, *Of Tender and Refuſal in Pleading*.

What they are.

Tender, in our Law, ſignifies, Carefully to Offer, or circumſpectly to Endeavour the Performance of any thing belonging to us: And *Refuſal*, is the Denying or Refuſing to accept of the ſame, when offer'd.

As by 16 *H.*7. 13. In Debt upon an Obligation the Defendant pleaded a *Tender*, and a *Refuſal* by the Plaintiff; and the Plaintiff took the *Refuſal* by Proteſtation, and Traverſed the *Tender*, as he ought, becauſe no *Refuſal* without a *Tender*.

See *Dyer* 28 *H.*8. 31. In Debt upon an Obligation, the Condition whereof was to make an Aſſurance of Lands upon Requeſt, as by the Counſel of the Plaintiff ſhould be deviſed: And the Defendant pleaded by *Proteſtation*, That the Plaintiff's Counſel made no Deviſe, and *for Plea*, That he was not Required. To which the Plaintiff Replied, That his Counſel deviſed a Releaſe, which he Requeſted the Defendant to Seal, and he Refuſed: And the Defendant would have Traverſed the Refuſal, and could not, but

but ought to maintain his *firſt Plea*, that is, *the Requeſt*; and the Plaintiff *ſhould not* have mentioned a *Refuſal*, but have Concluded the Iſſue upon the *Requeſt*, the Defendant offering a *Negative Plea* before.

And ſo 36 *H.* 6. 15. the Defendant in Debt did plead an *Award*, to pay 10 *l.* at ſuch a Place, which he was ready at the time to do, and the Plaintiff came not to receive the ſame. There the Plaintiff may ſay, That he was there ready, without Traverſe; becauſe the Defendant had *Tendred* a *Negative Plea* before.

Then, *Of the Iſſue, Negative Pregnant; which is, a Negative that implies, or contains in it ſelf, an Affirmative.* Of the Iſſue *Negative Pregnant*, what it is.

As where an Action, Information, or ſuch like, is brought againſt one, and he pleadeth in Bar to the Action: Or otherwiſe, a *Negative Plea*, which is not ſo direct an Anſwer to the Action, but that it includeth alſo an *Affirmative*.

As if a man be Impleaded, to have done a Thing on ſuch a Day, or in ſuch a Place, denies that he did it *Modo & forma declarata*, which implies nevertheleſs, that in ſome ſort he did it.

Or, if a Writ of Entry, *in Caſu proviſo*, be brought by him in the Reverſion, upon an Alienation of Tenant for Life, ſuppoſing that he hath Aliened in Fee, which is a Forfeiture of his Eſtate, and the Tenant to the Writ ſaith, *That he hath not Aliened in Fee*; this is a *Negative*, wherein is included an

Affirmative: For tho' it be true, *that he hath not aliened in Fee*; yet it may be, he hath made an *Eſtate-Tail*, which alſo is a *Forfeiture*, and then the Entry of him in the Reverſion is Lawful.

Vide 33 *H.* 8. *Br. Iſſue* 81. Where upon an Information, for buying Cloaths at *B. contra formam Statut'*, *Ne achata al* B. *contra formam Statut'*, ill; but ought to be, *Ne achata pas, Modo & forma, &c.*

Yet 16 *Ed.* 4. 5. One pleads a Releaſe *puis le darein Continuance*, *Nient ſon fait puis le darein Continuance*; a good Iſſue.

And 12 *Ed.* 4. 4. One did plead a Feoffment by Deed; and the other Replied, *Que ne Enfeoffa pas*, *modo & forma*; and good, without anſwering to the Deed.

As in a *Formedon*, to Count of a Special Gift, the other ought to ſay, *Ne dona pas, modo & forma:* Where its ſaid by *Littleton*, That if the Plaintiff proveth not the Feoffment by Deed, he faileth.

Modo & forma, what.

Now, *Modo & forma*, are Words of Art in Pleading, namely, in the Anſwer of the Defendant, whereby he denies the Thing laid to his Charge, *Modo & forma prout*, the Plaintiff hath Declared againſt him: As the *Civilians* in like caſe ſay, *Negat allegata, prout allegantur, eſſe vera.*

And it is to be Obſerved, that (upon *Iſſues*) theſe Words, *Modo & forma*, are not always of Subſtance, as appears by *Littleton*, in his Chapter of *Releaſes*, where the *Diſſeiſee* enters upon the Heir of the *Diſſeiſor*, who brings his Writ of *Right.*

Or,

Or, where (as before) one in a Writ of *Caſu Proviſo*, doth Count upon an Alienation in Fee; and the other doth ſay, *Ne Aliena, modo & forma*, and found that he Alienied for Life.

Or, where the Defendant in Treſpaſs doth plead, That the Plaintiff doth hold of him by *Fealty*, and Ten ſhillings Rent, and ſo demandeth Judgment of the Writ, *Vi & armis*; and the Plaintiff Replieth, *Que il ne teigne modo & forma*: And if the *Verdict* find, that he holdeth only by *Fealty*, yet good.

And ſo in Treſpaſs of *Battery*, If the Jury upon the *General Iſſue* find the Defendant Guilty at any other day and place, before the Plaintiff ſuppoſeth his Treſpaſs.

But ſee more of *Iſſues* afterwards, in the Titles, *Traverſe*, *Pleading*, &c.

Of *Traverſe* in Pleading. What it is.

The next in Order, is touching *Traverſe in Pleading*; which ſignifies in Pleading, to deny ſome Point, Matter, or Thing alledged on the other ſide, the formal Words of which are in our French, *Sans ceo*, in Latin, *Abſque hoc*, and in Engliſh, *Without that*.

And, firſt, to begin with the *Time*: It is plain, (as hath been already ſaid) that if the Defendant in Treſpaſs pleads *Non Culpabilis*, he ſhall have no advantage of the *Time*, but the Jury may find him Guilty at another day, be the Treſpaſs *Tranſitory* or *Local*.

And by *Littleton*, in his Chapter of *Releaſes*, fo. 13. In Treſpaſs of *Battery*, and the *General Iſſue* pleaded, the Jury may find the Defendant Guilty at another day and place.

And ſo is alſo 19 *H.* 6. 47. and 39 *Ed.* 3. all in the Title of *Traverſe:* But in Caſe of *Treſpaſs*, and other Actions, if the Plaintiff in his Declaration, lay a time before his Cauſe of Action, the Defendant in all Caſes upon the General Iſſue, ſhall have advantage thereof.

But, on the contrary, if once he have Cauſe of Action, it ſo ſtill continueth until he have diſcharged the ſame, and therefore he may lay it after the day: The like, as it ſeems upon the Iſſue of *Non dimiſit*; for (as before, *Littleton*, in the Chapter *Releaſes*) the Words *Modo & forma* in an Iſſue be not always of Subſtance: *Quære tamen*, if not, as if in the Number of years.

Time, where, and how Traverſable.

And, as divers Books be, *In many Caſes where the Defendant doth Juſtify, he may Traverſe the Time before, and in ſome Caſes the Time after, and in other ſome, the Time before and after.*

And therefore, where the Defendant, in Treſpaſs of Lands or Goods, maketh himſelf Title, by a *Feoffment*, *Gift*, or otherwiſe, which ſtill is in force ſuch a day after, he ſhall only Traverſe the Time before the Treſpaſs ſuppoſed.

And

And ſo is 15 *Ed.* 4. 23. 22 *H.* 6. 29. and other Books in the Title of *Traverſe:* And where by a Leaſe, or other Title, made and determined before the Day of the Treſpaſs, there he muſt Traverſe the *Time* after and before his Leaſe: But whether the Plaintiff may there Traverſe that *Juſtification* hath been a Queſtion, becauſe in ſo doing he *Departeth* from his Declaration. *Departure.*

And the better Opinion of the ſame Book of 15 *Ed.* 4. 23. is, That the Plaintiff may.

But 22 *Aſſ.* 36. the Defendant in Treſpaſs of *Battery* did plead a *Releaſe*, and Traverſed the *Time*; and the Plantiff Replied, the *Releaſe* was obtained by *Dureſs*, and by the better Opinion *no Plea*, for the Reaſon aforeſaid.

And 2 *R.* 3. 11. the Defendant in Treſpaſs of *Aſſault* and *Battery*, Juſtified at another day of the Plaintiff's own Aſſault, *Abſque hoc* that he was Guilty *antea vel poſtea*; and the Plaintiff Replied, *De injuria ſua propria*, and ill, for the Reaſons aforeſaid; *quod nota.*

And 43 *Ed.* 3. 11. the Plaintiff in a *Replevin* did Declare the Taking the 1*ſt* of *May*, and the Defendant did Avow in the ſame Place at another Day for *Damage feſant:* To which the Plaintiff Replied, *That it was his Common.*

And the *Rule* of the Book is, for *that the Taking ſhall be intended the Day in the Avowry, the Plaintiff's Replication is a Departure.* *Rule.* Concerning *Departure.*

And

And to that Intent is 33 *H.* 6. 14. where the Defendant in a *Quare Impedit* did *Claim nothing, but as Ordinary*; Judgment, if without a Special Diſturbance: To which the Plaintiff Replied, *That ſuch a Day, Year and Place he did Preſent, &c.* To which the Defendant did Rejoyn, *That at the ſame day the Church was Litigious, ſans ceo, que il Refuſa apres cel Jour:* To which the Plaintiff alledged a *Tender after*, and a *Refuſal*; and by the *Whole Court* holden a *Departure*; *quod nota.*

So that, by theſe later Books, it appears (if the ſame be Law) that the Day in moſt Caſes, may be made Material upon the Defendant's *Plea* and *Traverſe*; which in ſome Caſes ſhall be only to the *Time* before: As namely, when the Defendant pleading a *Feoffment*, and the like, which being intended to continue, proveth that he cannot be *Guilty after:* And ſometimes the *Time after*, as when in Treſpaſs he pleadeth a *Leaſe determined*, made in another Kings Reign: Or elſe the *Time before* and *after*, as appears in *Brook*, in the Title of *Traverſe.*

But where his Plea enableth him but to one *Speicl Time*, and Juſtifieth at another *Day* within his *Special Time*; as, *De ſon Aſſault demeſn*, or *a Licenſe for a Time*, or *a Special Maintenance*, or *for Common for a Time*, or the like: There the Defendant is to Traverſe the *Time before* and *after*, for the moſt part, as appears in the ſaid Title of *Traverſe*, 5 *Ed.* 4. 5. 10 *Ed.* 4. 2. 20 *H.* 6. 5, & 23. 31 *H.* 6. 37. and other Books there.

But

But, as 2 *Ed.* 4. 24, & 25. If the Defendant Juſtify for a Time in a former King's Reign, then he ſhall Traverſe the *Time after* only; becauſe upon that Writ he cannot be Guilty before.

And 27 *Aſſ.* 12. He that Juſtifieth in *Maintenance*, as one of the Indictors, needs not Traverſe the *Time before*, or *after*; and He that Juſtifieth as a Commiſſioner, the *Time before*.

Then ſhall be ſhewn, *Where the Place and County are, by the Defendant in his Anſwer, to be Traverſed.* Place and County, where Traverſable.

For which ſee partly before, in the Title of *General Iſſue*, That in Treſpaſs Local, if the Defendant Juſtify in another Place in the ſame County, he may chuſe ſo to do, and Traverſe the Place, or plead the General Iſſue at his Pleaſure; but if, in that Caſe, his Juſtification be in another County, (by the better Opinion) he ſhall be forced to the General Iſſue; (and ſo ſeems 9 *H.* 6. 62. in this Title of *Traverſe*) and the Jury bound to find the ſame, upon Pain of Attaint.

It appears alſo, in the ſame Title, that although the Matter in the Declaration be Tranſitory; yet if the Defendant's Juſtification goeth only to another County, or other Place, there the County or Place is Traverſable, and he cannot plead the General Iſſue.

For

For which ſee 27 *H.* 6. 1. 43 *Ed.* 3. 29. 7 *H.* 6. 35. 9 *H.* 6. 50, & 71. 21 *H.* 6. 8, & 9. and divers other Books in the ſame Title of *Traverſe*, in *Brook*; where it appears, That if the Special Juſtification be in any other County, the County is Traverſed; otherwiſe the Place, if the Juſtification be in the ſaid County.

And by many of theſe Books it appears, That if the Defendant doth Juſtify, by reaſon of a Special Bailment in another County, or of the Plaintiff's own Aſſent, he is to Traverſe the County; but if he Juſtify for the like Matter in the ſaid County, he is to take no Traverſe; *quod nota.*

And ſo is 21 *Ed.* 4. 29. by all the Court, That if the Defendant in Debt upon a Contract of a Horſe, alledge the ſame to be in another County, upon Condition, and Traverſe the former County; *tamen quære*, becauſe in that Action and Detinue the Defendant may Wage his Law.

And 22 *Ed.* 4. 39. the Defendant in Treſpaſs for *Taking away his Goods*, did Juſtifie by Commandment Conditional, *viz.* to Take them only in another County, and Traverſed the County where the Plaintiff laid his Action, and good

And ſo is 34 *H.* 8. *Bro. Traverſe* 36. 8. In an Action of *Diſceit*, for Making of *Falſe Cloaths* in *Bartholomew-Fair*, *contra formam Statut'*; the Defendant ſaid, That he made them *bien & duement* at *D.* in another County, and Traverſed the *Making* of them in *Bartholomew-Fair*; and good.

And

And always, in a *Replevin*, the *Place* of the Taking is Traverſable; for which ſee 16 *H.* 7. 7. where the Plaintiff declared of a Taking in *A.* in the County of *Oxon*, in a Place called *P.* and the Defendant ſaid, That the Taking was in *P.* in the Town of *O. ſans ceo que il priſt in* A. and holden, That the Defendant at his pleaſure may either Traverſe the Town or the Place; *quod nota.*

Where the Plea is good without Traverſe.

Next ſhall be ſhewn, *Where the Plea is good without Traverſe, and where the Traverſe doth make the Plea ill.*

And therefore, firſt, ſee 28 *H.* 8. *Dyer* 29. where the Defendant in Debt upon a Contract ſhewed, That the Contract was Conditional, *without Traverſe*, and good, and the Traverſe was on the other part.

And *Ibid. eodem Anno* 33. one did declare upon a *Leaſe* of 24 *Acres*; and the Defendant pleaded, That he Let the ſame, and 4 *Acres* more, and *good*; and ought to take no Traverſe, becauſe Confeſt, and more.

Yet 35 *H.* 6. 38. and 32 *H.* 6. 3. *Bro.* Tit. *Traverſe*, ſeem to the contrary, and their Pleas to the Count.

And 3 *Eliz. Dyer* 202. in Account by *Edward Clere*, Adminiſtrator of Sir *John Clere*, againſt *Barty* and the Dutcheſs of *Suffolk* his Wife, who pleaded, that Sir *John Clere* made *Walter Herend* his Executor without Traverſe, and Demurr'd to in Law.

See

See *Mich.* 10, & 11 *Eliz.* 280. in a *Replevin* between *Wootton* and Sir *Anthony Cook*, in *Dyer*; where *Cook* did Avow, as in his Freehold: To which *Wootton* did Reply, That the Land did *diſcend* to him and *Cook* in Coparcenary, without Traverſe.

But it is there ſaid, That if one Avow, that *A.* was ſeiſed in Fee, and granted to him a *Rent-Charge*; and the Plaintiff Replies, That *A.* was ſeiſed in *Tail* at the time of the Grant, and died, he ought to Traverſe, *Abſque hoc quod fuit ſeiſitus in feodo.*

And ſee the Caſe of *Vernon*, *Mich.* 21 & 22 *Eliz. Dyer* 366. *Rul'd*, according to a like Precedent 12 *H.* 8. *Rotulo* 639. That where *Vernon* in his Avowry did Claim by *diſcent*, as Heir to the Lord *Powis*; *Gray* in his Replication to that *Avowry* did ſhew, That the Lord *Powis* did Will it to him, *Abſque hoc quod terr' diſcend'*. The like, as it ſeems, if *Gray* had Conveyed as Heir in a nearer Degree.

And ſo is 19 *H.* 8. 60. there Vouched. But otherwiſe, as it ſeems, if he had Claimed by Survivorſhip, or in Coparcenary.

And 11 *H.* 7. 9. the Defendant in Treſpaſs, as Servant to another, Juſtified the *putting in his Maſter's Cattle:* To which the Plaintiff Replied, That he *put in his own Cattle*, and good, without Traverſe on his part; for it may be he put in his own and his Maſters alſo.

And

And ſee 22 *Ed.* 4. 39. that the *Writ* and the *Count* is but a Suppoſal; and therefore, the Defendant pleading a *Matter in Fait*, ſhall take no Traverſe, but the ſame ſhall firſt begin on the Plaintiff's part: As if the Defendant doth plead, *Jointenancy*; or the Defendant in *Dower* doth plead, That the Huſband of the Plaintiff had nothing but in Jointenancy with *B.* Or where *Baſtardy* is pleaded, or the like.

And ſo is 2 *Ed.* 4. 28, & 29. where in *Raviſhment de Gard* the Defendant did alledge *Jointenancy* in the *Anceſtor*, and others. And ſo where one doth plead the like, either in Abatement of the Writ, or Avowry.

See 21 *Ed.* 4. 36. the Defendant in Debt did plead, That the Plaintiff was Born in *Scotland*, *Judicium de Brevi*; and the Plaintiff Replied, That he was Born in *England*, without Traverſe, and that for the Miſchief of the Trial.

As is 6 *H.* 7. 5. where ſaid alſo, That if one plead a *Feoffment*, the other may ſay, That it was upon Condition, without Traverſe.

Vide cel Liver, and ſee 5 *H.* 7. 11, & 12. where it doth ſtand upon a Matter in Law; as againſt a *Prieſt*, to alledge *Unity of Poſſeſſion*, and the like; there no Traverſe.

And ſee 7 *Aſſ.* 10. a Plaint in an *Aſſize* of 4 Acres of *Meadow*; the Defendant did demand Judgment of the *Plaint*, becauſe it was Paſture; *quod nota.*

And

And ſee 14 *H.* 6. 17. in *Raviſhment de Gard* of which ſide the Traverſe ſhall be, and where any Confeſſing or Avoiding is, there no Traverſe.

And ſo Note, in what Caſes there ſhall not be any *Traverſe*; as namely, where the Defendant doth but plead in Abatement of the Writ, Count, or Avowry; (or doth (as before in moſt Caſes) plead in Bar, becauſe the Writ and Count is but a Suppoſal) where one in his Plea doth Anſwer the other, and more; or for the Miſchief of the Trial; or becauſe of a Matter in Law, &c.

Where the *Dying ſeiſed*, or *Diſcent*, Traverſable.

Next is to be known, *Where the Dying ſeiſed, or the Diſcent, is Traverſable.*

For which ſee the ſaid Book 19 *H.* 8. mentioned in the laſt Diviſion, where it is ſaid, *That the dying ſeiſed, and not the diſcent, is Traverſable.*

And as that Book, ſo ſeems *Brook* in *Traverſe* 6. and yet in the laſt Diviſion in *Vernon's* Caſe, and others, the *diſcent* Traverſable.

And 22 *H.* 7. 31. the Defendant in Treſpaſs made Title by *Diſcent*, and the Plaintiff in his Replication, by the ſame Perſon, did ſo too, with a Traverſe, *Abſque hoc quod Tenementa diſcend' al Defendant.*

Then,

Then, *When the Dying ſeiſed, or the Abatement, ſhall be Traverſed.*

Where the *Dying ſeiſed*, or *Abatement*, Traverſable.

By 18 *Ed.* 4. 1. 26. the Defendant in Treſpaſs did plead, That *A.* was ſeiſed, and did Enfeoff him: To which the Plaintiff Replied, That long time before *A.* was ſeiſed, his Father was ſeiſed, and *died ſeiſed*; after whoſe death *A.* did *Abate*, and Enfeoffed the Defendant, and the Plaintiff Entred, &c. And by all the Court the Defendant may maintain his Bar, and Traverſe the *Dying ſeiſed*, or the *Abatement*, at his pleaſure; *becauſe it is the Plaintiff's Title, and if any part of his Title be falſe, the other ſhall have the advantage thereof.*

The like 5 *Ed.* 4. 137. in a Writ of *Entry*, in the Nature of *Aſſize.*

See 5 *Ed.* 4. 85. in the like Caſe of an *Intruſion*, where it ſeems the Special Matter of the *Title*, and not of the *Intruſion*, is Traverſable.

And ſo ſeems to be 3 *H.* 7. 7. in the former Caſe of the *Abatement*, becauſe the *diſcent* not anſwered, which doth Entitle the Plaintiff, where his Anceſtor *died ſeiſed* of ſuch an Eſtate as doth *Toll* an *Entry.*

And 39 *H.* 6. 26, *&* 27. an *Abatement* is Material and Traverſable, where he that alledgeth the ſame, maketh Title by him that *died ſeiſed*; otherwiſe not.

And 38 *H.* 6. 22. in the like Caſe as before, in a Writ of *Entry* the Defendant did Traverſe the *Abatement*, and not the *Gift in Tail.*

Where *Dying ſeiſed, Conveyance*, or *Diſſeiſin*, Traverſable.

Then is to be obſerved, *Where the Dying ſeiſed, the Conveyance, or the Diſſeiſin alledged, ſhall be Traverſable.*

For which ſee, firſt, *Andrews* his Caſe, *Mich.* 21 & 22 *Eliz. Dyer* 365. the Plaintiff in an *Ejectione firmæ* did declare upon a Leaſe, made by my Lord *Cromwell*, againſt which, the Defendant being *Andrews* his Farmer, did plead, *Quod diu antequam le Plaintiff, ou ſon Leſſee, aliquid habuit in Præmiſſis*, one *John Blount* was ſeiſed, who Enfeoffed *Andrews* his Father, who died ſeiſed; and that *Andrews* let it to the Defendant, upon whom *Blount* Re-entred, and did him ouſt, and Diſſeiſed *Andrews*, and did Enfeoff my Lord *Cromwell*: To which, the Plaintiff taking the Parts of the Defendant's Plea by *Proteſtation*, did maintain *Blount*'s Feoffment to my Lord *Cromwell*, *Abſque hoc* that *Blount* Diſſeiſed *Andrews*. And it was long Debated, Whether in this Caſe he ought to Anſwer the *Diſcent*, or the *Feoffment* to *Andrews*; and the rather, becauſe both the Plaintiff and Defendant Claim by *one Perſon*.

And Laſtly, notwithſtanding the Books of 21 *H.*6.12. and 30 *H.*6.2. and 5 *Ed.*4. and 4 & 5 *H.*7. which Caſes were in *Treſpaſs* and *Aſſize*, for that this Caſe was in *Ejectione firmæ*, which contained Title in the Declaration, which Title ought to be anſwered by the Defendant, and no Bar with a Colour good; and for that the *Diſſeiſin* is alſo a Subſtantial part of the Bar, it was holden, to be in the Plaintiff's Election, either to Traverſe

Traverſe the ſame, or the *Diſcent*, or *Feoffment*, at his pleaſure.

And according to the ſame was Vouched 5 *Ed.* 4. 5. in a *Formedon*, and 9 *H.* 6. where taken for a Rule, *That a Diſſeiſin alledged either in* Bar, *or* Replication, *is always Traverſable.* *Rule.*

And 15 *Ed.* 4. 22. taketh difference, where the *Diſſeiſin* is alledged *in Fait*, and where only by way of *Suppoſal*; as in a *Declaration*, in a Writ of *Entry*, and the like.

And 5 *Ed.* 4. & 4. in this Title in *Bro.* 218. the *Diſſeiſin* Traverſable.

And 30 *H.* 6. 7. *Bro.* in this Title 360. is, That in Treſpaſs, the *Diſſeiſin*, and not the *Diſcent* is Traverſable; but otherwiſe in an *Aſſize.*

And divers other Caſes there be hereof, but the Caſe of my Lord *Dyer* may now ſerve.

Then we ſhall ſhew, *Where the Seiſin alledged in Fee, is to be Traverſed.* Where *Seiſin in Fee* alledged, ſhall be Traverſed.

Touching which Point there be many Caſes in our Books, the firſt whereof we ſhall Cite, is 26 *H.* 8. 4. where the Plaintiff in a *Quare Impedit* declar'd, That he was ſeiſed in Fee, and did Preſent: To which the Defendant did plead, That he himſelf was ſeiſed, and granted *proximam Advocationem* to *A.* and the Plaintiff by the Grant of *A.* did Preſent, and took no Traverſe, intending the Plaintiff's Declaration to be ſufficiently Confeſſed and Avoided: Where the Reporter maketh a *Mirum*, becauſe he *Mirum.*

did not Traverſe the *Seiſin in Fee* of the Plaintiff.

See the like 11 *Ed.*4. 11. becauſe Confeſſed and Avoided.

And ſee 33 *H.* 6. 49. where the Defendant in an *Aſſize* did plead, That his Father was *Seiſed in Fee*, and by *Proteſtation* died ſeiſed, &c. that the Plaintiff may make Title by a Stranger, *Abſque hoc quod Pater le Plaintiff aliquod habuit in Præmiſſis.*

In the Abridgment of which Caſe it is ſaid, That by the Book 8 *H.* 8. he may ſay, *Abſque hoc quod Pater Querentis fuit Seiſitus in Feodo.*

And 5 *Ed.* 4. 1. the Defendant in *Treſpaſs of Goods* did plead, That the Property was in him, and he Bailed them to *A.* to keep, who gave them to the Plaintiff, and he, &c. To which the Plaintiff Replied, That he was poſſeſſed, &c. *Abſque hoc*, that the Property was in the Defendant, *prout, &c.* And ſo, where the Defendant pleaded, That *A.* is ſeiſed in Fee, &c. the Plaintiff may ſay, That *B.* Let it to him at Will, &c. *Abſque hoc*, that *A.* was ſeiſed in Fee; or, *Abſque hoc, que Riens avoit forſque al volunt; quod nota.*

And ſee accordingly 18 *Ed.*4. 3. 21 *Ed.* 4. 17, & 83. and 4 *Ed.* 2. *Bro.* in the Title of *Traverſe* 372. which Book is, That the Defendant alledged one *A.* to be ſeiſed in Fee, &c. and the Plaintiff Traverſed the ſame; but not, *Abſque hoc, que Riens avoit, quod nota.*

And

And ſuch a Traverſe, 1 & 2 *Mar. Dyer* 112, holden a *Feofail.* *Traverſe* holden a *Feofail.*

But 22 *Ed.* 4. 38. if the Defendant ſay, His Father was ſeiſed in Fee; and the Plaintiff Replies, That *A.* did Let it to his Father, who held over his Term, *He ſhall take no ſuch Traverſe, becauſe of the Doubtfulneſs.*

And upon this manner of Pleading is a Notable Caſe in *Dyer* 365. *Anno* 21 *Eliz.* where in *Replevin* the Defendant, as Baily to Sir *Francis Leak*, made *Conuſance* for *Damage feſant*, as in the Freehold of the ſaid *Leak:* To which the Plaintiff Replied, That he was *ſeiſed* of *Butt-Cloſe, contigue adjacen' in Dominico ſuo ut de Feodo*; againſt which Sir *Francis Leak* ought to Incloſe, &c. To which the Defendant Rejoyn'd, That *Butt-Cloſe* was the Freehold of *J. S. Abſque hoc, quod le Plaintiff fuit ſeiſit' in Dominico ſuo ut de Feodo*; where holden, that the Traverſe was *good*, and if the Plaintiff be Miſtaken in his Eſtate, it ſhall be found againſt him; where holden alſo, That it was his Folly to alledge ſuch a *Preciſe Eſtate* in himſelf, whereof the other, by this Iſſue, ſhall have advantage; and that it had been ſufficient for him to alledge, That he was *ſeiſed* of *Butt-Cloſe*, without ſhewing how; and then the Defendant had been enforced to have Traverſed, *Abſque hoc, quod Querens aliquid habuit*: And ſo if the Plaintiff had had but an *Eſtate at Will*, or a *Licenſe of the Owner, hac vice*, it had been ſufficient; *quod nota.*

Of the Traverſe, *Aliquo alio modo.*

Then, as to the Traverſe, *Aliquo alio modo.*

If, according to 22 *H.* 6. 35. and other Books, the Defendant doth Juſtify by an Eſpecial Maintenance, he muſt Traverſe, *Abſque hoc, que il mainteine in aliquo alio modo*; but otherwiſe, if his Cauſe of Juſtification prove no Maintenance.

And ſo 5 *Ed.* 4. 119. in a Petition, where the Petitioner gave to the King a Special Poſſeſſion, *Sans ceo, que il avoit unque poſſeſſion de aſcun auter Corody, niſi in forma prædicta.*

And ſo 4 *Ed.* 4. 13. the Defendant in *Treſpaſs*, upon the Statute of 5 *R.* 2. Juſtified, That a *Diſtreſs* being Awarded againſt the Plaintiff, out of the Court of *A.* he deſired the Bailiff, to Aid him to Diſtrain, *Quæ eſt eadem Intraco', &c.* and ill, becauſe he claimed nothing in the Soil; but when he added further the Traverſe, *Abſque hoc, quod ipſe Intravit in aliquo alio modo*, then good, for doubt of the *Laygents:* And by Others, he ſall ſay, *Abſque hoc, quod ipſe Intravit, (ſicome le Brief ſuppoſe) prout per Breve ſupponitur:* And by Others, in this Caſe he ought to plead the General Iſſue.

And 13 *H.* 6. 13. in Debt againſt an Executor, the Defendant pleaded, that the Party died Inteſtate, and that the Ordinary committed the Adminiſtration to *A.* and the Defendant, as Servant to *A.* ſold the Goods, *Abſque hoc, quod ipſe Adminiſtravit in aliquo alio modo.*

But

But this manner of Pleading seems to be, for the Avoiding the danger of the General Issue; for which see more in that Special Title.

Then, *Which of the Conveyances alledged, is to be Traversed.* Which of the Conveyances to be Traversed.

And therefore see first, 27 *H.* 8. 2 & 3. where said, That if the Defendant in *Trespass* do plead, That the Plaintiff Let it to *A.* who granted his Estate to the Defendant; the Plaintiff shall not Traverse the Grant to the Defendant, but his own Lease.

And so is 15 *H.* 7. 2 & 3. In an Action of *Trespass* brought by the Prior of *Tower-Hill*, because the Plaintiff's own Lease; where it was also Agreed, *That the most Material Matter, alledged by the Defendant, is always Traversable*; as a *Recovery, or Discent*, and the like; and not any the mean Conveyances, because he is in Possession, against which the Plaintiff ought to make a sufficient Title.

But by *Fineux* and *Keble*, *Where by way of Replication many Conveyances are pleaded, the Defendant may Traverse which of them it pleaseth him.* *Nota.*

But as the said Year of *H.* 7. fo. 11. If the Defendant in *Trespass* Convey a Title by Mean Estates from a Stranger, and not from the Plaintiff, and give Colour; the Plaintiff may Traverse which of them he will.

And ſo is 16 *H.*6. *Bro. Traverſe* 346. becauſe a Bar at large.

But if he ſay, That *A.* did Enfeoff him, by force whereof he was *ſeiſed*, until by the Plaintiff *diſſeiſed*, and he did Re-enter, &c. (which Plea, as it ſeems, is good without *Colour*) the Plaintiff ought, in that Caſe, to Traverſe the *Diſſeiſin.*

But if, as in that laſt Caſe, the Defendant had Conveyed, as by a *Gift in Tail*, the Plaintiff there may Traverſe the *Gift in Tail*; *quod nota.*

Nota. And ſee 4 *Ed.* 6. *Bro. Traverſe* 154. The Plaintiff in *Aſſize* againſt a *General Bar*, did make Title by *Feoffment* and *Diſcent*, which did *Remit* him; where holden, That the Defendant cannot Traverſe the *Feoffment*, but the *Diſcent*, which is the Material Matter of the Title.

Remitter.

And 35 *H.* 6. 59. in *Treſpaſs* by a Biſhop againſt a Prior, who ſaid, That his Predeceſſor was *ſeiſed*, and died, and then himſelf Elected, and gave *Colour*: To which the Plaintiff Replied, That he was *ſeiſed*, until by *A. diſſeiſed*, upon whom the Predeceſſor of the Defendant did Enter, &c. *There the Defendant is to Traverſe the* Diſſeiſin *by* A. *as moſt Material.*

Nota.

But as it appears by the ſame Book 27 *H.*8. firſt cited in this Diviſion, That although the Defendant Convey by Mean Degrees from the Plaintiff himſelf; yet if he plead

falſe

false in any Point, the Plaintiff by like Pleading may Traverse him.

As, in the said Case of 27 *H.* 8. he may say, That after his Lessee did surrender to him, *Absque hoc*, that he did assign his Estate to the Defendant, *modo & forma, &c.*

And 43 *Ed.* 3. 7. the King in a *Quare Impedit* made Title by an Heir in his Ward, Conveying the Discent to him by Mean Degrees of *Cosinage*, the Defendant shall not say, *Nul tiel in Reie nature* (*nulla talis persona in Rerum natura*) as in the Mean Conveyance of Kindred; *quod nota.*

But in a *Mort dancestor*, or other Action *Ancestrel*, as is 9 *Ed.* 4. 6. the Mean Conveyance of Kindred is Traversable: But there said, to be otherwise in any other Action, by the Books, in all Cases of *Challenge.*

Commandment, where Traversable.

In the next place, it will be requisite to know, *Where the Commandment is Traversable.*

For which see 37 *H.* 6. 7. where the Defendant in *Trespass* did plead, That the Freehold was to *J. S.* and that he by his Commandment did the *Trespass*; and the Plaintiff made Title by a Lease from a Stranger, *Absque hoc, que le Defendant Enter per Commandment* J. S. and good, *per Cur.*

And see 14 *H.* 6. and divers other Books there Vouched in *Bro. Traverse* 325. That if the Defendant in *Trespass* do Justify by the Commandment of the Owner, the Commandment is Traversable; *quære tamen.*

But

But in all Cases where the other Conveys from the same Person, the Commandment is Traversable.

Qui Estate, where Traversable.

The like, as it seems, of *Qui Estate*, if both Parties Claim from one Person, as 11 *H.* 4. 81. 19 *H.* 6. 56, & 57. 10 *Ed.* 4. 6. 18 *Ed.* 4. 10. and 6 *Ed.* 4. 12. in the Title of *Traverse* in *Brook*.

But see more hereof in the Title *Qui Estate*, where the same is Traversed, although they do not Convey by one Person.

Several Traverses to be taken in one Plea.

And in some Cases there are several Traverses to be taken in one Plea; as, by Experience, the Defendant in an Information, that pleads a *Special Plea*, or is to *Traverse an Office*, ought to Confess and Avoid, or Traverse every of the Kings Titles alledged.

And see 12 *Ed.* 4. 14, & 19. That the Defendant in *Trespass* did plead a *Gift in Tail* to his Father, and gave *Colour*; and the Plaintiff made Title by a *Common Recovery*: To which the Defendant did Rejoyn, That his Father, before the Recovery made a *Feoffment*, and took an Estate back again, and then after the Recovery, and before Execution, died; *Sans ceo, que le Recoveror entra en vie son Pier*; *Et sans ceo, que son Pier avoit auter Estate tempore brevis*; *Et sans ceo, que le Recoveror fuit seisie prout in Replicatione specificat'*: *Et issint le Recovery feint, &c.* and admitted.

Three Traverses to one Replication.

And

And 22 *H.* 6. 16. One *Utlaw'd* by the Name of *J.S.* of *D. Butcher*, came in upon the *Capias Utlagatum*, and said, That he was *Demurrant* at *S.* and not at *D.* and was a *Husbandman*, and not a *Butcher*; and so two Traverses taken. Two Traverses to one Plea.

In some Cases there shall be Traverse upon Traverse: Where a Traverse may be upon a Traverse.

As 9 *H.* 6. 1, & 2. and other Books, where in a *Præcipe* against Two, one pleaded *Non-tenure*, and the other *Jointenancy* with a Stranger, and Traversed, *Sans ceo, que le auter Riens avoit*; and the Plaintiff Replied, That the Defendants are Tenants, as the Writ supposeth, and Traverseth *Absque hoc, que le Stranger Riens avoit.*

And see 18 *Ed.* 4. 10. That if the Defendant in *Trespass* make Title by a *Feoffment* or *Gift in Tail*, and give Colour to the Plaintiff, the Plaintiff without making any Title, may Traverse the Feoffment or Gift, *per totam Curiam præter Brian*; but contrary in *Assize.* Where the Defendant may Traverse without making Title.

Yet by *Brook*, or the *Reporter*, the Law seemeth with *Brian*; and for that the Defendant is in possession (it seems) the Plaintiff shall be forced to make Title against him, as well in *Trespass* as in *Assize*; *quod nota.*

Next, of the Plea of *Tout temps prist*, or *Semper paratus*; which is a Plea by way of Excuse, or Defence, for him that is Sued for any Debt or Duty belonging to the Plaintiff. *Tout Temps prist*, what.

As

As in Debt upon an Obligation, with Condition for the Payment of a leſſer Sum to the Obligee; although the Place be named in the Obligation, yet the Obligor, by 7 *Edw.* 4. 3. is bound to plead, *Tout temps priſt, & Tender les deniers in Court*; yea, although the Obligee (as it was pleaded there) Refuſed the ſame, becauſe part of the Sum contained in the Bond.

Otherwiſe, if the Condition be to Perform an *Arbitrement*, *&c.* as is 16 *H.* 7. 7. *&c.*

And yet 7 *H.* 6. 18. the Obligor is not bound to Tender at another Place than where mentioned in the Obligation, no more than the Tenant, who Tendred his Rent upon the Land at the time of the *Diſtreſs.*

And if a *Defeaſance* to an Obligation be for the Payment of a Leſſer Sum, the Obligor, according to 33 *H.* 6. 3. need not to plead, *Uncore priſt.*

And 21 *Ed.* 4. 42, & 52. If an Obligation be with Condition for the payment of a Leſſer Sum, and the Obligor Tender, and the other Refuſe, he ſhall not plead, *Uncore priſt.*

But 21 *H.* 6. and other Books againſt the ſame, and ſo is Experience at this day.

And 21 *Ed.* 4. 25. the Obligor did in this Caſe of Payment of a Leſſer Sum, plead *Uncore priſt*, where its ſaid, That if the Obligee take Iſſue upon the *Tender*, and found againſt him, he hath loſt the Advantage of the Obligation for ever.

And

And according to this Learning is 20 *Ed.* 4. 1. and other Books.

But if the Condition be to make a *Feoffment*, or to perform an *Arbitrement*, or to pay Mony to a Stranger, he ſhall not plead *Uncore priſt*.

The like 16 *H.* 7. 7. 11 *H.* 6. 27. & 22 *H.* 6. 39. of an *Abitrement*.

The like 19 *H.* 8. 12. 27 *H.* 8. 1. and 14 *H.* 6. 23. where to do any Collateral Act, although to perform Covenants, and one of the Covenants be, to pay his Rent; as the ſame Book 27 *H.* 8. is.

Where *Tender* ſhall be made in Court, and where not.

Then is to be known, *Where the Tender ſhall be made in Court, and where not.*

Vide 7 *H.* 4. *Bro.* Tit. *Arbitrement* 12. where the Defendant in *Treſpaſs* pleaded an *Arbitrement in Bar*, to give a Piece of Cloth, and had the ſame in Court.

The like 8 *H.* 6. 25. of Mony to be paid.

And yet 21 *Ed.* 4. 8. in *Dower*, the Defendant pleaded, That the Plaintiff detained a Hamper of *Evidences*: To which the Plaintiff Reply'd, That ſhe was always ready to deliver the Hamper of *Evidences*; by Reaſon whereof ſhe had *Judgment Maintenant*, and yet ſhe had not the *Hamper* in Court.

And 24 *Ed.* 3. 31. if the Defendant in a Writ of *Ward* Claim nothing, but becauſe of Nurture, he ought to have the Infant in Court.

And ſo is 24 *Ed.* 3. although the Infant be Sick.

And

And yet *Fitz.* 8 *Ed.* 3. he found *Mainprize* to have the Infant in Court.

And 6 *Ed.* 4. 11. the Defendant in *Detinue* of *Corn* did plead, *Tout Temps & uncore eſt*, without having the Corn in Court; and the Plaintiff Replied, That (ſuch a Day) he Required the ſame, and the other Refuſed to pay; and Iſſue thereupon.

Uncore priſt, in what other Caſe to be pleaded.

Then, *In what other Caſe a man ſhall plead, Uncore priſt.*

As 14 *H.* 7. 32. and 15 *H.* 7. 1. in a Writ of *Annuity*, which was granted until the Plaintiff was Promoted to a Benefice: If the Defendant do plead a *Tender* hanging the Writ, he ought not to Tender the *Arrerages* alſo, becauſe the Plaintiff ſhall have *Debt* for the ſame.

And 33 *H.* 6. 26. the Garniſhee in *Detinue* did plead, That the Goods were delivered to the Defendant upon this Condition, That if the *Garniſhee* did perform the *Arbitrement* of *J. S.* then he ſhould have them; and that *J. S.* did Arbitrate, he ſhould pay to the Plaintiff Forty ſhillings, which he did Tender, and need not plead, *Uncore priſt*; for that the Mony was not in demand in that Action.

And upon that Reaſon is 7 *H.* 4. 3. That if the Defendant in *Treſpaſs* of *Goods* make a ſufficient *Juſtification*, although he Confeſs a *Detainer*, yet he need not plead, *Uncore priſt.*

And

And by the Book of 1 *R.* 3. 1. in *Debt* upon a *Single Bill*, or *Obligation*, by the way, the Defendant may plead, That he was, and yet is ready to pay, if the Plaintiff would have delivered him an *Acquittance*: by which it ſhould ſeem, that the Plaintiff in that Caſe ought to Offer an *Acquittance*, as he is to demand Rent that is payable on the Ground; *quære inde.*

In which ſaid Caſe, and 21 *Ed.* 3. which are abridged by *Fitzherbert*, in his Title of *Verdict* 13. If the Defendant *Tender* Parcel, the Payments being ſeveral; as Rents at ſeveral Feaſts, and the like: There, if the Defendant, upon the Demand of the Plaintiff, or otherwiſe, where he is bound to Tender, without demand, do Offer Parcel, the Plaintiff is bound to Receive the ſame, and the Defendant may plead it, as it ſeems, to the Whole.

The like in *Detinue of ſeveral Parcels*; (but otherwiſe of an Entire Sum, or Parcel) where in the ſaid Book of 1 *R.* 3. its ſaid, That if the Plaintiff in *Detinue of ſeveral Parcels*, lay an *Entire Value*, as he may, then if the Defendant can plead, *Tout temps priſt*, of any Parcel (or, according to ſome, do, before *Verdict*, Offer any Parcel in Court) the Plaintiff is at a Miſchief, touching his Recovery of the Value of the reſt, becauſe he hath not laid ſeveral Values: But if in that Caſe there be a *Verdict*, then is the Sum of the Value made a thing Entire, whereof the Plaintiff is not bound to Receive part without the whole

But

Eſtoppel, or *Counterplea.*

But of this Plea of Tout temps priſt, *the Defendant may be Concluded.*

As if he *Imparl*, by the Book of 5 *Ed.* 4. 141. which was in *Dower.*

Otherwiſe, if in Debt he came in upon the *Diſtreſs*, as is 7 *H.*4.9. becauſe it may be he was *Nient Summon'* by the Sheriff.

Otherwiſe in *Annuity*, 2 *H.*4.3. and 14 *H.* 6.3, & 4. after an *Eſſoin* in *Dower*, becauſe it may be laid by an Eſtranger, the Defendant ſhall plead, *Tout temps priſt.*

And ſo is 7 *H.*6.7. & 17.

And by 2 *H.* 4. 7. if the Tenant in *Dower* came in the firſt day, and pleaded *Tout temps priſt*; the Demandant cannot Reply, That before ſhe demanded *Dower* in the Country, becauſe the Writ affirms the Tenant's Title; *quod nota.*

Of the Plea, *De ſon Tort demeſn.*

Then is to be Conſidered, the Plea of *De ſon Tort demeſn*, That upon many *Juſtifications*, the Plaintiff is to Anſwer to the Matter of the Defendant's Plea eſpecially, and not to Traverſe generally, *De ſon Tort demeſne ſans tiel Cauſe.*

As 16 *H.* 7. 3. where the Defendant in *Treſpaſs* doth Juſtify, as by *Commandment*, *Licenſe*, or *Delivery* of the Plaintiff.

And ſo is alſo 12 *Ed.* 4. 11, and 20 *Ed.* 4.4. And ſo is 9 *Ed.*4.4.

The like by *Brian* and *Townſend*, 2 *H.*7.3. where the Defendant in *Falſe Impriſonment* doth Juſtify by Reaſon of a *Robbery*, and that the *Common Voice* and *Fame* went upon the Plaintiff.

The

The like, as it ſeems by the ſame Book, 20 *Ed.* 4. where the Defendant doth *Juſtify* by reaſon of a Matter in Law, and to ſee if *Waſt* were done; or, *To Enter a Tavern to Drink.*

And by 33 *H.* 6. 41. and 14 *H.* 4. 31. the Defendant in *Treſpaſs* did Juſtify, for that the Anceſtor of the Plaintiff held of his Maſter by *Knights Service*, and that by the Commandment of his Maſter he ſeiſed the Plaintiff; here the Plaintiff is to Traverſe the *Commandment.*

And ſo is alſo 14 *H.* 4. 32. in the Caſe of an *Apprentice.*

And ſo 44 *Ed.* 3. 18. where the Plaintiff pleaded a *Grant.*

And 38 *Ed.* 3. 3. the Defendant in a *Replevin* did Juſtify by reaſon of an Execution upon a Recovery in a *Court Baron*, and *De ſon Tort demeſn* General, no Plea.

And ſo is 33 *H.* 6. 29. if the Defendant do Juſtify by the *Kings Patent*, becauſe a Matter of Record.

The like 10 *H.* 6. 3. where the *Defendant* in *Treſpaſs* did Juſtify, to make Replevin by a Warrant of the Sheriff; or came in *Aid* of the Servant that had a Warrant to Arreſt the Plaintiff, as is 2 *H.* 4. 6.

The like 2 *H.* 5. 1. where the Defendant in a *Replevin* doth make Conuſance, as Bailiff to *A.*

And ſo 28 *Ed.* 3. 98. if the Defendant do Juſtifie the *Taking of Goods* by the Commandment of *A*, to whom the Plaintiff is Villain.

Tithes. And ſo 16 *Ed.* 44. where the Defendant in *Treſpaſs* doth Juſtifie for *Diſms*, ſevered from the Nine parts.

And 28 *H.* 6. 9. the Defendant did Juſtify in *Treſpaſs* by reaſon of a *Way*, and the Plaintiff Replied *De ſon Tort demeſn*, *Abſque hoc*, *que le Defendant & ſes Aunceſtors ount uſe d'aver tiel Chymin*, *&c.*

Notwithſtanding ſee this Title in *Brook*, in many of theſe Caſes, the Iſſue of *De ſon Tort demeſn ſans tiel Cauſe*, ſufficient; and eſpecially where the Defendant doth himſelf make no Title, but as *Servant*, or doth come in Aid of the Sheriff, or the like; and in all Caſes *d'Aſſault le Plaintiff*; or, where the Sheriff maketh a Warrant to his *Servant*; or, for *Suſpicion of Felony*, or the like.

And as 5 *H.* 7. 9. where the Defendant doth Juſtify by Cuſtom of *Faldage*.

Or 9 *Ed.* 4 22. where the Defendant in *Treſpaſs* Juſtified for *Wreck*; and in many other Caſes where the Defendant doth Juſtify by Matter in *Fait*, the ſame General Replicati..., *De ſon Tort demeſn*, hath been admitted.

Que Eſtate, what. Next, of the Plea of *Que Eſtate*, which ſignifies *verbatim*, *Which Eſtate*, or the *Same Eſtate*; and is a Plea, whereby a man Entitling another to Land, &c. ſaith, *That the* Same Eſtate *himſelf had*, *he had from him.*

As

As in a *Quare Impedit* the Plaintiff alledgeth, That ſuch Four Perſons were ſeiſed of Lands, whereunto the *Advowſon* in queſtion was appendant, in Fee, and Preſented to the Church; and that afterwards the Church became void, *Que Eſtate*——, that is, *Which Eſtate* of the ſaid Four Perſons he hath now *during the Vacation*, by virtue whereof he Preſented, &c. *Vide Bro.* 175. Tit. *Que Eſtate, & Co.* 1 *Inſt.* 121.

And ſee alſo 2 *H.* 6. 10. where holden, That the Plaintiff in his Declaration, or Title, ſhall not Convey to himſelf by a *Que Eſtate.*

Otherwiſe in a *Replevin* after *Avowry*; for after *Avowry*, the Defendant is become Actor.

And ſo is 3 *H.* 6. 28. and accordingly are divers Books in *Brook*, in this Title *Que Eſtate.*

And *Mich.* 1 & 2 *Mar. Dyer* 172.

And yet, as appears in the ſame Title, 2 *H.* 4. 13. and other Caſes there, that where the Defendant by his Bar doth admit the Plaintiff Tenant to the Land, there the Plaintiff in his Replication, Conveying to himſelf Title to the ſame, may do it by a *Que Eſtate.*

And by the Book 3 *H.* 6. 11. 22 *H.* 6. 34. and divers other Books in this Title in *Brook*, The *Avowant* may in his Avowry Convey to the Plaintiff an Eſtate in the Tenancy by a *Que Eſtate*, becauſe he is a Stranger to his Title, which ſeemeth Reaſon.

And it appears by the ſame Book in *Dyer*, fo. 172. That a Term cannot be Conveyed in Pleading (be the Party Actor, or otherwiſe) by a *Que Eſtate*.

And to that Intent is 7 *Ed.* 3. *Brook* in this Title 31. be the ſame a Term, or Eſtate for Life, or in Tail.

And yet there 38 *Aſſ.* 4. the Defendant in an *Aſſize* did Convey from *T.* by Statute, by a *Que Eſtate*.

And ſee 5 *H.* 7. 39. 40 *Aſſ.* 28. 15 *Ed.* 4. 16. and 2 *H.* 4. 20. of *Tenant in Tail*, eſpecially if the Party be to aver his Life.

And ſee in this Title *Bro.* 12 *Ed.* 3. That the Tenant may *Rebut* by reaſon of a Waranty by a *Que Eſtate*; but not be Vouched.

And ſee 22 *H.* 6. 13. and 26 *Aſſ.* 8. But 10 *Aſſ.* 5. to the contrary.

And ſee alſo the Books 11 *H.* 4. 81. 37 *H.* 6. 32. and 1 *Ed.* 6. in this Title 4. That a *Que Eſtate* is not to be alledged in any of the Mean Conveyances, but to the Tenant himſelf, without ſhewing *Coment*, notwithſtanding the ſame hath been ſuffered.

Shewing how.

And it appeareth alſo, that in Pleading a *Que Eſtate*, the Party by whom ſuch Eſtate is Conveyed, muſt be ſhewed in Pleading, to have a *Good Eſtate*; as by *Recovery*, *Feoffment*, or *Releaſe*, or the like; and not ſufficient to ſay, That *A.* was ſeiſed, *whoſe Eſtate* the Defendant hath.

And ſo is 7 *Ed.* 4. 26. and 9 *H.* 7. 14.

Vide

Vide 21 *Ed.* 4. 21. That Tenant in *Dower* coming in by Law, Conveyed her Eſtate by a *Que Eſtate.*

And ſo, 6 *Ed.* 4. 12. although he came to the Land by *Diſſeiſin.*

And ſo ſeems 31 *H.* 8. *Bro.* 48. if he Recover the ſame; but againſt that is the Book of 39 *H.* 6.

Choſe in Grant.

And it appears alſo, *That a Thing that lieth in Grant, cannot be made Title to by* Que Eſtate, *although by way of Bar.*

And ſo 11 *H.* 4. 89. of an *Hundred.*

And ſo 24 *Ed.* 3. 22. and 31 *Aſſ.* and 12 *H.* 7. 16, & 18. of a *Rent* or *Common*; except it be incident to ſome thing that may paſs without Deed, unleſs he ſhew a Deed to maintain his Preſcription.

Not Traverſable, but in particular Caſes.

And although in many Caſes it be ſufficient Title; yet, as it ſeems 6 Ed. 4. 12. *is never Traverſable, but where both Parties Claim by one Perſon.*

And yet ſee 19 *H.* 6. 56. and 11 *H.* 4. 81. where the *Que Eſtate* Traverſed, although the Party that did *take* the *Traverſe*, did not Claim by the ſame Perſon.

And ſee in that Title 6 *Ed.* 4. 12. and 18 *Ed.* 4. 29. That where the Defendant doth give to the Plaintiff Title by a *Que Eſtate*, there the ſame is Traverſable by the Plaintiff.

Double Plea, what.

Next in Order, we ſhall ſay ſomething of *Double Pleas.*

A *Double Plea* is that, wherein the Defendant alledgeth for himſelf *Two ſeveral Matters* in *Bar* of the Plaintiff's *Action*, whereof either is ſufficient to Effect his Deſire, which ſhall not be admitted for a *Plea.*

As, if a man alledge *Several Matters*, the one nothing depending upon the other, the *Plea* is accounted *Double*, and not admittable; but if they be mutually depending each upon the other, then it ſhall be accounted *ſingle.*

And touching *Double Pleas*, ſee thereof the ſaid Title in *Brook's Abridgment*; as namely, where one Anſwer will make an End of all, as *Ne dona pas*, and the like, there no *Doubleneſs*; or if the Defendant plead *divers Matters*, and rely upon *One* of them; or do ſhew in his Pleading *divers Matters* of *Inducement*, or of *Suſpicion*; or doth alledge *Two Preſentments* in a *Quare Impedit*, the one in the *Guardian* or *Particular Tenant*, and the other in the *Party himſelf.*

And 40 *Ed.* 3. 11. *divers Matters* alledged to ouſt the *Conuſance.*

11 *H.* 6. 10. to prove a *Maintenance*, the Party may ſhew *divers Matters.*

And *Ibid.* 11. That *Appendancy* and *Preſcription* is *double.*

But 13 *H.* 8. *è contra.*

And by divers Books, a *Leaſe* and *Releaſe*, *double.*

And

And where one bindeth himſelf in 10 *l.* in the Indenture, to perform divers Covenants, the Plaintiff can declare but upon the Breach of one, if he demand the 10 *l.*

Otherwiſe, if he bring an Action upon the Covenants, as appears by 11 *Ed.* 4. 10.

And by 9 *H.* 7. 23. One pleads, that he was ſeiſed, until by the other diſſeiſed; againſt whom he did Recover, and *not Double*, becauſe the one is Conveyance to the other.

And by 5 *H.* 7. 36. where one cannot come to the one Plea without the other, there *no Doubleneſs*, as *Seiſin* and *Feoffment*, and the like.

And 4 *H.* 7. 17. and 1 *H.* 7. 14.

And by 5 *H.* 7. 1. *Non dederunt arbitrium in ſcriptis*, Double.

And by 21 *H.* 7. 10. a *Collateral Waranty* and *Aſſets*, Double; and the like.

Whereof ſee more at large in this Title of *Double Plea*, in *Brook* and *Fitzherbert*; and in *Partridge* and *Strange*'s Caſe in *Plowden*'s *Com.* and in that Caſe in *Dyer*, That *Barganizaſſet* and *Conceſſiſſet*, not *double*, becauſe words of one ſignification.

And accordingly alſo 35 *H.* 6.

Then ought to be known, *How one ſhall have Divers Pleas, when one of them ſhall go to the Whole.* Divers Pleas, and one goes to the Whole.

And therefore, firſt, ſee 1 *Ed.* 4. 29. In an *Aſſize* of the Office of *Clerk of the Crown*,

brought by two Perſons, where the Defendant pleaded to one of the Plaintiffs, That he was an *Alien*, and to the other *Nul tiel Office*, becauſe the laſt went to the Whole; it was holden to be *double*.

And yet 37 *H.* 6. 30. the Defendant pleaded a *Fine* to the *Whole*, and did Conclude to the *Moiety*, and ſo for the other *Moiety*, and good.

And *eodem Anno* 38. the Defendant did Juſtify to the *Third Part* for one Cauſe, and to the other *Two Parts* by another Cauſe.

And *Mich.* 13 & 14 *Eliz. Dyer* 305. the Defendant in Treſpaſs of *Trees* may plead, as to the *Cutting*, *Not Guilty*; and as to the *Taking*, he may plead a *Gift* of them.

And ſo 33 *H.* 6. 12. and 48 *Ed.* 3. 18. in *Debt* againſt an *Executor*, the Defendant did Plead to *part* an *Acquittance*, and to the *reſt*, *plene Adminiſtravit*.

And ſo is 28 *Ed.* 3. 91.

See more hereof in this eſpecial Title, *Deux Pleas & un ya al Tout*, in *Brook*, where this Difference is holden, That if one Perſon pleads *divers Pleas*, and the one of them goeth to the *whole Writ* or *Action*, that only ſhall be received.

Which of the Pleas ſhall be firſt Tried.

And where *ſeveral Pleas* are pleaded by divers Defendants, in any *Perſonal Action*, and one of them goeth to the Whole, that *Plea* ſhall be firſt Tried, and the reſt of the Defendants ſhall have Advantage thereof.

Where

Where alſo a difference is taken between this kind of *Pleading* and a *Double Plea*; and touching this, any Perſon may ſhew the ſame to the Court, as *Amicus Curiæ*; and the other, none but the Party.

And ſee the Book of 9 *H.* 6. in that Title 4. which takes this difference, That if there be two Defendants in a *Real Action*, and they plead *ſeverally* to the Action, and *One* of their Pleas goeth to the *whole*, as *Baſtardy*, and the like, the other ſhall have no Advantage: But otherwiſe, if one of them doth *Plead* to the *Writ*, the ſame ſhall be *firſt Tried*, and the other ſhall have advantage of it.

The like in *Perſonal Actions* to the Action.

But if there be but one Defendant either in *Real* or *Perſonal Actions*, and he pleads *ſeveral Pleas* to the *Writ* or *Action*, and one of them goeth to the *Whole*, that which goth to the *whole* ſhall only be taken.

And accordingly ſeems 37 *H.*6.37.

Then ſhall be ſhewed, *Where the Plea is ill, without ſhewing of the Deed, or Record.* *Monſtrans de Faits, ou Records.*

Firſt, It appears 20 *H.* 7. 6. That he which is a Stranger to the Patent and Deed, and claimeth nothing by the ſame, or by him that hath Right, ſhall not ſhew the ſame: And ſome queſtion 1 *H.* 7. 24. if the Termor of a *Common* ſhall.

And

And 29 *Aſſ.* 21. ſeems, That he that deriveth but a Particular Eſtate ſhall not. But 14 *H.* 4. he that deriveth any Intereſt, be it Particular, or otherwiſe, by *Commandment* ſhall ſhew.

And 21 *Ed.* 4. 50. a Servant that Juſtifieth a Diſtreſs for his Maſter, ſhall ſhew the Deed; but otherwiſe of an Incumbent that pleadeth a Grant of *Prochein Avoidance* to his Patron, becauſe he claimeth only the *Incumbency* and not the *Patronage*.

And 9 *H.* 7. 13. one brought a *Quare Impedit*, and Counted, that *A.* was ſeiſed, and did Grant *proximam Advocationem* to *B.* and after did grant to *C.* who granted the ſame to him; and the Queſtion was, *Whether he ſhould ſhew the Deed made to* B.?

And 42 *Aſſ.* 2. one ſhall plead a *Will* without ſhewing, becauſe it appertains not to him.

And 22 *Aſſ.* 52. the Under-Eſcheator ſhall ſhew the Patent. But 28 *H.* 8. *Dyer* 29. not.

And 39 *Ed.* 3. 37. the Grantee of *Prochein Avoidance*, was not enforced to ſhew a Compoſition, which declared to be his Grantor's Title, becauſe he had not his whole Eſtate.

But 22 *H.* 6. 42. the Servant ſhall; but otherwiſe of the Servant of a Collector that Diſtrained for a Tax, becauſe an Act of Parliament the Principal Matter of his Title.

And

And 7 *H.* 6. 1. he that prays to be Received by reaſon of a Remainder; or a Woman that demandeth Dower of Rent, ſhall not ſhew the Deed, becauſe it doth not belong to them.

And upon this Reaſon ſee the Books 38 *Ed.* 3. 37. 14 *H.* 4. 30. 11 *H.* 4. 83. and divers other Books, That where the Deed doth appertain to him, there he ſhall not be forced to ſhew the ſame.

And ſo 35 *H.* 6. 31, & 32. where his Authority is determined, and the Patent doth appertain to another; as to another Officer, and the like.

And this Learning is approved of in *Plowden*, in the Caſe of *Second Deliverance*, brought by *Throgmorton* againſt *Tracy*, where one pleaded a Leaſe by a *Corporation*, to begin after another was determined; where holden, That the firſt Leaſe need not be ſhewed for Three Reaſons:

Firſt, Becauſe it did not belong to him.

Secondly, Becauſe that Eſtate was determined. And,

Thirdly, Becauſe the Defendant's Eſtate was Executed.

And further, touching the *Learning* in this Point, ſee *Dyer*, firſt, 28 *H.* 8. fol. 29. left doubtful, whether a Particular Grantee ſhall ſhew the Main Grant.

And *Ibid.* 30 *H.* 8. 54. rather that he ſhall; and therefore learn what the Law in that Caſe is.

And

And ſome Books take a difference, where one deriveth himſelf an Intereſt to the Whole in Part of the thing, there he ſhall ſhew; but if but to part of the Eſtate, then not.

Where the Eſtate is Executed.

Next, *Where the Eſtate is Executed, there need not the Deed, for the moſt part, to be ſhewed.*

And firſt, 15 *Ed.* 4. 16. If one Convey to a Poſſeſſion Executed in himſelf by the Grantee of a Reverſion and Attornment, there he need not ſhew the Deed. Otherwiſe to a Rent, or to Land in Remainder by Grant of a Corporation.

But the Iſſue in Tail of a *Rent Executed* ſhall have a *Formedon* in the *Diſcender.*

And by 11 *H.* 4. 39. and 14 *H.* 4. 31. if a Remainder be once Executed, the Iſſue in Tail may have a *Formedon*, as of a Gift in Poſſeſſion.

But in a *Formedon in Remainder*, the Deed muſt be ſhewed.

And ſo is 18 *H.* 8. 4. and 34 *Ed.* 3.

Yet 10 *Eliz. Dyer* 277. in a *Formedon in Remainder*, upon a Gift to Uſes in Tail, holden, that he need not ſhew the Deed for two Cauſes: One, becauſe the Eſtate may be made without Deed; and the other, becauſe it appertained to the Feoffor.

And therefore 1 & 2 *Mar. Dyer* 174. a Stranger to a Deed ſhall plead a Grant without ſaying, that it was by Deed.

And

And by *Dyer* 28 *H.*8.29. Tenants in Common, making Partition to Preſent by Turns, when it is once Executed, the Deed thereof need not after to be ſhewed; *quod nota.*

The like Law, as it ſeems of *Executors* and *Adminiſtrators*, touching the ſhewing of the Will; where the difference is, that being Defendant, or bringing an Action of his own Poſſeſſion, he ſhall not be compelled to ſhew the Will, or Letters of Adminiſtration. Executors and Adminiſtrators.

And ſo is 21 *H.*6.23. 10 *Ed.*4.1. 16 *Ed.*4.1. and divers other Books, although the Plea be but to the Writ, as that he is Adminiſtrator.

But 42 *Ed.*3.4. 3 *Ed.*3.31. and 7 *H.*6. 41. In Treſpaſs *de bonis aſportat' in vita Teſtatoris*, he muſt ſhew the Will.

And ſo is 6 *E.*41. and 16 *Ed.*4.8.

But by 19 *H.*6. he need not ſhew it in another Term.

And this difference of Plaintiff and Defendant is confirmed in *Plowden's Com.* in *Graysbrook* and *Fox's* Caſe.

Next, we ſhall ſhew, *How the Vouchee ſhall be forced to ſhew a Deed.* Vouchee.

And therefore, Firſt, by 22 *Aſſ.*88. he that Voucheth as *Aſſignee*, ſhall not only ſhew the firſt Deed, but the Deeds of Aſſignment alſo; and to that intent is 3 *H.*6. and other Books in this Title in *Bro.*5.

But he may *Rebut* by the firſt Deed. *Quære tamen.*

For

For 3 *H.*7.13 & 14. ſeems, that he need not ſhew the Deeds of Aſſignment upon Voucher.

And ſee 48 *Ed.* 3. 5. That the Tenant in Dower vouching the Heir of full Age, yet ought to ſhew a Deed; *quod nota.*

But yet ſee 50 *Ed.*3.25. That in the ſame Caſe, or in any other, as it ſeems, he that doth Vouch one, unleſs he do pray alſo that the *Parol* may *demur* for Nonage, ſhall not need to ſhew any Deed to the Demandant.

For which ſee more at large in *Brook* and *Fitzherbert*'s Abridgments, in the Title *Voucher.*

And 10 *H.* 7. 21. he that Voucheth as Aſſignee of the Reverſion, to ſave the Tail, ſhall ſhew: But *Keble è contra*, and Vouched divers Books.

Action ſur Record.

And then, *How an Action may be upon Record without ſhewing.*

It appears 9 *Ed.* 4. 5 *H.* 7. and 32 *H.* 6. in *Brook, hoc Titulo* 158 & 159. Be the Action in the ſame Court, or another, the Party that brings the Action ſhall not be enforced to ſhew the ſame: But if the Record be in the ſame Court unremoved by Error, or otherwiſe, the Defendant may demand *Oyer* of of the ſame, and ſhall have it; but if otherwiſe, he is bound to take Conuſance thereof, and to plead *Nul tiel Record*, and thereupon the Record it ſelf ſhall be ſent down by *Mittimus.*

And

And ſo is 39 *H.* 6. 4. But by that Book it ſufficeth if the Tenor of the Record be Certified.

And 7 *H.* 6. 18. one brought *Debt* in the *Common Pleas*, upon Damages recovered in Treſpaſs at *York*, in a Court of *Piepowder*, containing the Tenour of the ſaid *Record* in his Count, and how it came into the *Chancery*, and thither by *Mittimus*; and yet the Defendant did plead, *Nul tiel Record*, *quod nota.*

But touching this Point further, *How the Record ſhall be Certified, and where the Tenour of the Record will ſerve, or not*, ſee *Dyer* 8 *Eliz.* 250. 6 *Eliz.* 227. 3 *Eliz.* 187, 188. and otherwiſe there.

Then it appears, That although one have not the Deed, yet if it appear of Record in the ſame Court, pleaded by another at that time, he ſhall have advantage of it.

As 40 *Aſſ.* 34. In an *Aſſize* againſt two, the one having a Waranty to Bar the Plaintiff, pleaded the ſame for his part; and although he would not ſuffer his Companion to help himſelf by the ſame, yet the other took advantage thereof.

As by *Littleton*, in his Chapter of *Eſtates* upon *Condition* 90 & 91. If a Deed be once pleaded, the other may ſhew, That in the ſame there is a Condition, &c.

And

And 24 *Ed.* 3. 73. the Defendant pleaded a *Releaſe*, which the Plaintiff did deny, and after was Nonſuit: And in another Action brought in the ſame Court, the Defendant did plead the ſame again, without ſhewing as a Deed gainſaid, remaining in the Court.

And by 21 *Ed.* 448 & 49. If a man plead *Letters Patents* remaining of Record in the ſaid Court, he ſhall not ſhew them; and ſo ſaid to be the uſe of the *Exchequer*.

And 1 *Eliz.* in *Dyer* 17. a *Leaſe* of a Biſhop Inrolled in the *Chancery*, pleaded without ſhewing, and it ſeems ill by that Book.

CHAP.

CHAP. VI.

Of Pleading in General.

THen touching *Pleading in General*, more than before hath been diſcourſed of in the ſeveral Diviſions. And, *Nul Seiſin al-ledge.*

Firſt, *Where one in Pleading ſhall ſhew, how he was ſeiſed.*

And therefore in ſome Caſes, *One may Convey to himſelf an Eſtate, without ſhewing how he that gave it was ſeiſed.*

And by 34 *H.* 6. 48. in the *Writ* or *Count* may be ſaid *(quod quidam* J.S. *dimiſit)* That ſuch an one Let, without ſhewing that he was ſeiſed. Otherwiſe by way of *Bar* or *Title.*

And ſo 9 *H.*4.5. 21 *H.*7.26. and 10 *H.*6. in a *Formedon*, may ſay, *Dedit.*

And next, *Where one ſhall ſay he was ſeiſed; In Dominico ſuo, &c.* *In Dominico ſuo, &c.*

For which ſee, firſt, *Littleton*, where the Thing lieth in Demean, as *Land*, or *Rent, &c.* Or where otherwiſe, as *Advowſons.*

And 30 *H.* 6. 7. one of a *Way* did ſay, *In Dominico ſuo ut de feodo & de jure.*

And 21 *Ed.* 4. 80. of a Copyhold, *in Dominico ſuo, &c. ſecundum Conſuetud'.*

And ſee 7 *H.* 6. *Dyer* 83. of *Tithes*, one ſhall ſay *in Dominico ſuo ut de feodo*, becauſe palbable, &c.

And ſee in *Wortley's Ejectione firmæ*, in *Plowden*, That of a Reverſion dependant upon an Eſtate for Years, *In Dominico ſuo*, is the proper Pleading; but the Plea of *De Feodo* admitted.

In Jure Uxoris. Then next, *Where in Pleading ſhall be ſaid, In Jure Uxoris, &c.*

See, firſt, 27 *H.* 8. 21. where Lands are given to the *Baron* and *Feme*, and the Heirs of the Body of the *Feme*, the Plea ſhall be, *Quod fuerunt ſeiſit' ſimul, & hæred' de Corpore le Feme.*

And 12 *H.* 7. 14. the Defendant in Treſpaſs did plead, That *He* and his *Wife* were ſeiſed in their *Demean*, as of *Fee*; and ſaid not *In jure Uxoris*, or *Conjunctim*, and yet good; becauſe, if he have Title to any part, it is not material in what manner.

And ſo in *Wortley's* Caſe in *Plowden*, of a *Term* in Right of his Wife.

Where two Perſons are ſeiſed. Next, *Where more, and one Intereſſed.*

See 37 *H.* 6. 24. where Lands are given to Two, and the Heirs of One of them; the Pleading ſhall be, *Quod fuer' ſeiſit'*, *viz.* the one, *In Dominico ſuo ut de feodo*, and the other, *In Dominico ſuo ut de lib'o Tenemento.*

In Jure Coronæ. And then of the Plea, *In Jure Coronæ.*

34 *H.* 6. 34. In a *Quare Impedit*, the Plaintiff made Title, for that King *Henry* the Fourth was ſeiſed, &c. and did not ſay, *In Jure Coronæ*, and good; for there is ſaid to be no other Form.

And

And ſee 7 *Ed.* 6. *Dyer* 83. accordingly, touching *Religious Lands*, where the ſaid Book of 34 *H.* 6. is Vouched, and ſhewed to be the better Pleading.

And ſo is 1 & 2 *Mar. Dyer* 103.

In jure Domus.

And touching the Pleading of *In jure Domus*, the ſaid Book of 1 & 2 *Mar.* holdeth the ſame good, being alledged in a *Maſter* and *Brother*, without ſhewing, *In jure Domus*; becauſe it cannot be intended otherwiſe.

The like in *Fulmerſton's* and *Steward's* Caſe, in *Plowden*: Otherwiſe of a Biſhop.

And ſee a good Difference in *Grindon's Quare Impedit*, in *Plowden*, If a *Religious Houſe* be ſeiſed of a *Parſonage Impropriate*, and part of the ſame be in Queſtion, the *Seiſin* muſt be alledged, *ut in Jure Rectoriæ*: But if the *Advowſon*, or the *whole Parſonage* be in Debate, then the *Seiſin* muſt be alledged, *ut in Jure Domus.*

Seiſin alledged, without ſhewing of what Eſtate.

Then, *Whether it be ſufficient to alledge a Seiſin in any, without ſhewing of what Eſtate.*

See, firſt, 24 *Ed.* 3. 75. where one pleaded, That his Father was ſeiſed, and died ſeiſed, &c. and ſhewed not of what Eſtate; and ill; becauſe a Title made thereby.

But otherwiſe in *Dyer*, 21 & 22 *Eliz.* 365. in Sir *Francis Leak's* Caſe, in a *Replevin*, where the Queſtion was about keeping the Incloſure; the Avowant did ſay, That *he*

was ſeiſed in his Demean, as of Fee, &c. which was *Traverſed*; where ſaid, That he need not in this Caſe ſhew any Eſtate whereof he is ſeiſed, becauſe touching this Matter his Eſtate is not Material.

Yet holden 21 *Ed.* 4. 52. He that pleadeth an Eſtate for Years, ſhall ſhew, how he that Let it him was ſeiſed; *quod nota.*

Particular Eſtate, how to be pleaded.

Then, *How he that hath but an Eſtate for Life, or an Eſtate-Tail, or an Uſe, ſhall plead the ſame without ſhewing the beginning thereof.*

And, firſt, touching an *Uſe*, the Books, for the moſt part, are, That ſuch an one was ſeiſed to his Uſe, without ſhewing how the ſame was Created.

And 36 *H.* 8. *Bro.* Pl. 160. is, *That it is good.*

And ſo 21 *H.* 7. 6. and 28 *H.* 8. *Dyer.* But cannot ſay, That *A.* was ſeiſed in Tail, without ſhewing *de quo dono.*

And touching that, 16 *H.* 7. hath a difference between an *Office* and *Pleading.*

And 13 *H.* 7. 18. is, That one may plead, that *A.* and others were ſeiſed to his Uſe in *Fee*; but not in *Tail*, without ſhewing *Cement.*

Vide Dyer 1 *Eliz.* Doubtful.

And 1 *Ed.* 4. 65. where one did Juſtify for *Tithes*, as Parſon Imparſonee, he ought to ſhew, How he came to the Parſonage.

And

And *Mich.* 6 & 7 *Eliz.* in *Dyer* 79. the Plaintiff in Partition did declare her ſelf to be Co-heir in Tail, with the Defendants, of the Inheritance of the Duke of *Suffolk*, without ſhewing the Beginning of the Tail, becauſe it doth affect the Poſſeſſion of the Defendants, and doth demand no Land.

And 1 *Mar. Dyer* 100. If Tenant for *Life* or in *Tail*, bring a Writ of *Entry*, he ſhall declare the *Seiſin*, *Ut de libero Tenemento.*

Then, *Where in Pleading for Certainty to every Intent, it muſt be ſhewed, that the Eſtate did Continue at the time*; or the like.

Where the Eſtate muſt be ſhew'd to Continue at the time, &c.

As 10 *H.* 7. 26. and 7 *H.* 7. 3. If one Juſtify by the Commandment or Leaſe of *Ceſtuy que Uſe*, he muſt ſhew expreſly, that the Uſe Continued at the time.

And ſo 10 *H.* 6. 21. If a *Recovery* be pleaded againſt one by Default, he muſt ſay expreſly, That he was Tenant at the time: Or, in Pleading of a Releaſe by Fine, or otherwiſe, That the Party was Tenant at the time.

And ſo 21 & 22 *E.* 4.

And ſee *Dyer*, 2 *Eliz.* 178. where one pleaded, That a *Prior* and *Convent* were ſeiſed of a Reverſion, *Ac poſtea Conceſſer' Reverſionem:* And did not ſay, *Et ſic inde ſeiſitus*; or, *de tali ſtatu ſeiſit'*; and there ſaid, it ſhall be intended to Continue.

And *Ibid.* 3 & 4 *Mar.* 143. In Pleading of a *Diſcent* the Form is, *Et ſic ſeiſit', de tali ſtatu ſuo obiit inde ſeiſit'.*

And 20 *Eliz. Dyer* 361. One pleaded a Grant of a Rent to him out of Land, without ſhewing expreſly, That the Grantor was ſeiſed of the Land at the time, &c.

Which of the Parties ſhall ſet forth the Place where, &c. in Pleading.

Then is to be known, *When, and of which Side the Place in Pleading ſhall be ſhewed.*

For which ſee a good Caſe, 1 *Ed.* 5. 3. where holden, That if the Defendant plead, that *A.* was poſſeſt, it ſhall be intended in the ſame County where the Action lay.

The like, if one plead a Releaſe of *Action, Arbitrement*, or the like.

But if one plead a *Surrender*, and *Releaſe* of *Right*, and doth alledge no Place, it ſhall be intended upon the Land, *per totam Curiam.*

And 10 *H.* 7. 6. In Debt againſt an *Executor*, the Defendant did plead, That there was another Executor in Life, and ſhewed not at what Place; becauſe if the other deny the ſame, he ſhall in his Rejoynder ſay, *In vie al* Dale, *&c.*

And ſo 2 *Ed.* 4. 14. In Debt againſt an *Abbot*, upon a Contract, *Quod venit ad Uſum Domus*; the Defendant ſaid, *Quod non venit ad Uſum Domus*; and the Plaintiff in his Replication ſhewed at what Place.

And 12 *Ed.* 4. 10. He that Juſtifies by Commandment of a Stranger, ſhall ſhew the Place; but otherwiſe, as Servant.

And

And 6 *Ed.* 4. 10. taketh this Diverſity, That where one by way of Bar (where he ſhall recover nothing) doth plead a *Releaſe*, *Acquittance*, *vel hujuſmodi*, there he ſhall need to ſhew no Place: Nor where the Defendant doth Juſtify in a *Replevin*, and doth not pray a Retorn.

But in another *Avowry*, *Declaration*, or *Title*, otherwiſe; there the Place is Traverſable.

And ſo is 3 *H.* 7. 11. in a Retorn of *Reſcous*.

And 3 *Ed.* 4. 27. He that pleadeth a Leaſe for Years, ſhall ſet forth the Place: Otherwiſe of an Eſtate for Life.

And 5 *Ed.* 4. 121. He that pleadeth a Payment upon an Obligation, muſt plead a Place.

And 28 *H.* 8. *Dyer* 14. He that pleads the Birth of one, by the Better Opinion, ſhall not need to ſhew the Place where, &c. but it may be alledged after, where it is ſhewed, that he is in Life; yet there holden, That in Debt upon the Arrerages of an *Annuity*, 35 *H.* 6. granted till he was Promoted to a Benefice, and that he had taken a Wife; there the Place where ought to be Specially alledged; *quod nota.*

And in *VVortley's Ejectione firmæ*, in *Plowden's Com.* where the Plaintiff in his Count did Declare upon a Leaſe by divers Mean Conveyances; holden there ſufficient, to ſhew where his own Leaſe was made, and not where the Farmer, or where the

Parties died; nor when, and where the Prior was Elected, &c.

Bona Notabilia, in divers Dioceſes, how to be pleaded.

And 10 *H.* 7. 18. where it is pleaded, *That the Teſtator had Goods in divers Dioceſes, moveable*; he ought to ſhew, in what Place, and what Goods, that the Court may Adjudge, if ſufficient.

But 30 *H.* 6. 1. If the Plaintiff upon the Plea, *Ne unques Executor*, or *Riens per Diſcent*, Reply, That the Defendant did Adminiſter as Executor; or that he had Aſſets *Enter mains*, or Aſſets by *Diſcent*, he ſhall ſhew in what Place, but not what Things, or what Lands.

And ſo is alſo 19 *H.* 7. 14 & 29. unleſs in ſome Special Caſe there declared; as, the Defendant doth ſhew how he adminiſtred certain Goods *Circa Funeralia, ultra quæ, &c.* There if the Plaintiff will ſhew he Adminiſtred any other, he muſt ſhew what they were; *quod nota.*

Where the County ſhall be taken by Intendment.

Then, *Where, if a Place be ſhewed in Pleading, the County ſhall be intended.*

As 5 *Ed.* 4. 138. the Defendant in Debt pleaded, That the Plaintiff had Received parcel at *D. pendente Brevi*, and no Plea, without ſhewing in what County *D.* is: But otherwiſe in a Writ, where the *County* is alledged before in the ſame.

And 4 *H.* 7. 8. where it was Surmized, that *A.* had broken the Peace at *B.* and becauſe not ſhewed in what County *B.* was, therefore ill.

But

But 39 *H.* 6. 13. in an *Annuity* by Preſcription, and *Seiſin* alledged by the Plaintiff at *B.* not ſhewing in what County, and whether *B.* was a Town or not; and yet holden, that it ſhall be intended in the ſame County: As in a Writ of *Præcipe de terris in B.* or a Writ of *Treſpaſs, &c.*

And 36 *H.* 6. 12. one brought a Writ of *Maintenance*, and declared of a *Maintenance* in the *Common Pleas*, not ſhewing where the *Bench* was; and doubted.

Then, in the next place, ſhall be ſhewn, *Where, when, and how, a Day or Time certain ſhall be alledged in Pleading.*

Where the *Day* or *Time* ſhall be certainly alledged in Pleading.

As by 38 *H.* 6. 3. it ſeemeth to be ſufficient to Plead, That the King granted to *A.* for Life, and after by his *Letters Patents* of ſuch a Date granted the Reverſion to him, not ſhewing the Date of the firſt, or by his *Letters Patents* reciting, how that he had granted for Life, before he had granted the Reverſion to him; *Quære inde.*

For 9 *Eliz. Dyer* 259. ſuch a Plea, in the Caſe of a Common Perſon, thought *ill.*

And 20 *Aſſ.* 16. is ſaid, That in an *Aſſize* in *London*, is uſed to put in the Plaint the Day and Year of the *Aſſize*, as in Perſonal Actions: But otherwiſe in other *Aſſizes*, no more than in Real or Mixt Actions.

And ſo is 7 *H.* 7. 5. That in Real Actions the Plaintiff ſhall not need to declare of the *Day*, *Place*, and *Year*, as in Perſonal.

Yet

Yet 10 *H.*6. 17. the Defendant in *Treſpaſs* did plead the Gift of the Plaintiff: To which the Plaintiff Replied, That, after that, the Defendant gave the ſame to him again. And the Defendant by his *Rejoynder* did maintain his *Bar*, *Abſque hoc*, That he did Re-give thoſe Goods after the firſt Gift; and ſuffered.

And ſee 20 *H.* 8. *Dyer* 27. where one pleaded a *Defeazance*, not ſhewing any Day. *Vide Librum.*

And 3 *H.*6. 31. in *Treſpaſs* for Taking his Servant; the Defendant pleaded, That before he was Retained with the Plaintiff, he was Retained with him; there the Plaintiff ſhall ſay in his Replication, That, *ſuch a day*, he was Retained with him, before which Time he was not Retained with the Defendant.

And 36 *H.*6.44. in an *Accompt* by an Executor, the Defendant did plead, That the Teſtator made the Plaintiff and *A.* his Executors. To which the Plaintiff Replied, That afterwards he made the Plaintiff his Sole Executor: To which the Defendant in his Rejoynder, was forced to ſhew what Day the Teſtator made the Plaintiff and the other his Executors, *Abſque hoc*, That he made the Plaintiff afterwards his Sole Executor; *quod nota.*

And Note, That in *Bullock's* Caſe in *Dyer*, 10 *Eliz.* 281. The Plaintiff in *Replevin* did plead the Feoffment of the Biſhop of *Sarum*, without ſhewing it to be by Deed, or at what Time.

Then

Then shall be considered, *How an Act Spiritual shall be Pleaded.* *Act Spiritual, how to be pleaded.*

And therefore, first, 11 *H.* 7. 8. *Concurrentibus hiis quæ de Jure requiruntur*, is not sufficient in Pleading of an *Union*; but must shew, who made the same, as the *Pope*, or the *Ordinary*, *&c.*

Anno 7 *Ed.* 4. 32. one Conveyed by a *Prior*, who was afterwards Translated to be an *Abbot*, was forced to shew how he was made *Abbot*; as that the Pope granted to such a Bishop to make him.

And 5 *Ed.* 4. 7. one brought Debt against the *Provost* of the College of *T.* in *Cambridge*, of a Sale of Goods to his Predecessor; who afterwards was amoved, and the Defendant Elected, and without shewing *Coment*; *quod nota.*

And *Mich.* 12 *&* 13 *Eliz. Dyer* 292. it appeareth in a *Quare Impedit*, that one did declare of a *Deprivation*, and did not shew before whom the same was, and holden very sufficient; for if it be gainsaid, it may come in the Replication, for to have a Writ to the Bishop for the same.

Then, touching the *Pleading of Matters of Record.* Of Pleading Matters of Record; as,

It is said in 21 *Ed.* 4. 54. That he that Pleadeth an *Utlary* in the same Court, may begin at the *Exigent*, if he will, because good, until it be Reversed; and that in Debt upon a Recovery, he may begin at the *Judgment*, or at the *Original*, at his pleasure, *per totam Curiam.* *Utlary.* *Recovery in Debt.*

And

Recognizance.

And ſee 36 *H.* 6. 5. That in Debt upon a *Recognizance*, omitting the Condition, good, Adjudged upon the Plea of *Nul tiel Record*; where 'twas ſaid by *Danvers*, *That if part of a Record make for one, and part againſt him, he may in Pleading, or in his Delaration, take the one, omitting the other.*

But *Aſhton* and *Priſot* were to the contrary, *viz. That the party in Pleading a Recovery, is to begin at the Original, and not to omit ſo much as any* Continuance, Summons, *or* Severance.

Return of a Writ.

And 37 *H.* 6. 14. by *Priſot*, If one plead a *Return* of a *Writ*, he ſhall plead, That *J. S. Vic'*, did Return the ſame before *John Priſot*, and other his Companions, Juſtices, &c. But in pleading the Purchaſe of a Writ, he muſt not ſay, *Que tiel Jour il purchaſe un Brief, mes que il purchaſe un Brief portant Teſte tiel Jour, retornable devant les Juſtices del Common Bank*, and not as in the Caſe of a *Return* of the Sheriff *devant* Priſot, *& ſes Compagnions, &c. quod Nota.*

For which ſee more in *Brook* and *Fitzherbert* in their *Abridgments*, in the Titles of *Record*, and *Failer de ceo.*

And for pleading of a *Record*, ſee *Yelverton* 39. *Cro.* 2 Part 817. *Preſton* verſus *Preſton*, *Style*'s Rep. 22. Caſe 1. *Co.* 1 *Inſt.* 225, 453. *Co. Lib.* 10. 92. *Lib.* 5. 52, 218, 260.

But

But see *Plowden's Com.* in *Dyve* and *Maningham's* Case; where in Debt brought by *Dyve* upon an Obligation, the Defendant shewed, That one was in Execution upon a Statute, and for his Delivery was this Obligation made to the Plaintiff, as Sheriff; where holden, that this Record of *Execution*, not being the Force of the Defendant's *Bar*, but the Conveyance thereof, need not be pleaded *Specially* from the beginning.

So in an Action of *Disceit* against an Attorney; or where one doth Avow, by reason of an Execution upon a Statute; as is 34 *H.* 6.

But, as it appears 22 *Ed.* 4. 8. to plead a *Recovery* of Twenty Acres, (*Inter alia*) ill; but ought to plead, That he did Recover Forty Acres, whereof these Twenty Acres were parcel: Nor shall he plead, That *J. S.* was seised of Twenty Acres (*Inter alia*,) and did Enfeoff him (*Inter alia*;) but ought to plead as before: Yet said there, it might be permitted in pleading a Feoffment. *Inter alia.*

And the same Case of *Dyve* and *Maningham*, taketh this difference between the Pleading of an *Act of Parliament*, and a *Recovery*; *quod nota.* Acts of Parliament, how pleaded.

Where holden also, That the Defendant in that Action, could not take advantage of the Statute of 23 *H.* 6. being but Particular, although it be touching all *Sheriffs* in General, without Pleading; but containing divers Things,

Things, may well be pleaded (*Inter alia*) or ſo much as doth avail him.

And in *Fulmerſtons* and *Steward's* Caſe there, either of the Parties may take advantage by Pleading of ſo much of the Statute of 31 *H.*8. of *Monaſteries.*

But in the Caſe of *Debt* there brought by *Partridge*, againſt *Strange* and *Croke*, upon the Statute of 32 *H.* 8. of Buying of *Titles*, holden by all the Juſtices, except *Mountague*, That the ſame being General; need not Specially to be recited; as, to pray to be *Received*, and to Demur Generally upon a *Vouchee* out of the *Lieu.*

But by all the *Juſtices* there, the *Miſrecital* maketh the *Declaration* ill: For in Pleading many times, a thing not Material is made Effectual.

And there in Debt, by *Stradling* againſt *Morgan*, a Receiver, upon the Statute of 7 *Ed.*6. for *Taking great Fees there*, ſet down by Statute, Exception was taken, for not reciting the Statute of 34 *H.* 8. that ſet down the Fees.

And in *Williams* and *Barkley's* Caſe, in *Coke's Reports*; although one did but plead part of that Act, which did Enable the Queen to Take, yet ſufficient; where ſaid, *That every one hath Intereſt in the King, therefore the ſame is a General Act.*

See the like Learning in *Dyer*, as 28 *H.*8. 27. where a Condition of a Leaſe made to a *Parſon*, was, That he ſhould not Grant the Eſtate over, if he will have advantage of the Statute of 21 *H.* 8. which Enacteth,

That

That ſuch ſhall be granted their Terms over, it muſt be Specially pleaded, becauſe Particular, as a *Private Cuſtom.* And this Statute is but General in Particularity; as a Statute that Pardoneth all that were of the Party of *Richard* the Third; of the Statute *De Medietate Linguæ*; or if a Statute were made, *That Tenants for Life ſhall not be puniſhed in Waſt*, and the like.

And as it hath been taken of late, in all Caſes of *Pardons*, by Act of Parliament, if any Perſons be Excepted for the ſame thing.

And *Ibid.* 7 *Ed.* 6. 83. by the Better Opinion, in an *Aſſize of Tithes*, given by the Statute of 31 *H.*8. the Plaintiff in his Plaint need not to mention the ſame Statute, as well in reſpect the ſaid Statute is General, as that it is to give Juriſdiction to the Common Law, as a General Pardon by Parliament; and Reſembled it to the Caſe of 14 *H.*4. were *Conuſance* granted, and after a *New Action* is given by Parliament, the Grant ſhall not extend to the ſame: But otherwiſe where the Action was before, and other Things granted to be within the ſame.

Where ſaid alſo, That in Pleading a Feoffment by *Ceſtuy que Uſe*, according to the Statute of *Ric.* 3. need not to mention the Statute; or in Pleading a *Feoffment* to uſe at this day, to ſay, That it was Executed *Vigore, &c.* of the Statute of 27 *H.*8. Or, in Pleading a *Deviſe*, to Recite the Statute of *Wills*; *quod nota.*

Then,

Per Nomen, how pleaded.

Then, *How one ſhall Plead by a* Per Nomen.

And, Firſt, 30 *Ed.* 3. *Fitz.* Tit. *Feoffments* 18. One pleaded a Grant to *J. S. & A. ſa Feme, Per Nomen J. S. & Uxoris ejus.*

And 1 *H.* 7. 28. the Tenant in *Aſſize* did plead a Feoffment, *de prædicta terra, per Nomen omnium Terrarum, quæ ſibi diſcendebant de parte Patris*; and took no Averment, becauſe of the word *Prædict'*.

And ſo 33 *H.* 8. *Bro.* Tit. *Pleading* 143. in a *Præcipe de Manerio de* B. the Tenant pleaded a Recovery *de prædicto Manerio, Per Nomen, &c.*

So, if *J. S.* pleads a *Feoffment* made to him *Per Nomen J. N.*

Where holden alſo, That he may plead the *Feoffment* Generally of the ſame thing, without a *Per Nomen*; and the Variance in the Deed, not Material: But there ſaid, to be better to Plead it with a *Per Nomen.*

Touching which, ſee more in *Dyers* and *Plowden's Reports*; as namely 7 *Ed.* 6. *Dyer* 83. where, in *Serjeant's* Caſe, the *Plaint* being of a Portion of *Tithes*, iſſuing out of 300 Acres in *N.* did make his Title in the ſame Plaint, That *Hen.* 8. *dedit & conceſſit prædictam Portionem* (*inter alia*) *Per Nomen totius Portionis, &c. proveniens' de Terris Dominicalibus Archiepiſcopi* Eborum *jacens' in* N. *nuper Monaſterii dudum ſpectan'*, *adtunc vel nuper in Tenura* A. and did not Aver *in facto*, That the Lands put in View were the Demean Lands of the Archbiſhop, in the Tenure of *A.*; and yet (as

(as there ſeemeth) *good*; but not for the Reaſon aforeſaid, but in reſpect there was other Certainty enough.

As 26 *Aſſ.* of a Grant of 20 *Carucat' Ligni in Boſco de* D. *quas habuit de dono Patris*; that Deed *De dono Patris* needs not to be ſhewn or averr'd, becauſe of other Certainty enough.

And ſo 2 *Ed.* 4. where one doth Releaſe all his Right in *White-Acre*, *quem habuit per diſcenſum, &c.*

Where ſaid alſo, That if one of the *Recitals* be falſe, yet the *Patent* good enough, becauſe Certain in ſome part; and then in Averring that which was falſe might be hurtful, and that the Counſel ſhould then deſerve their Fees ill.

Where ſaid alſo, That if *falſe in all*, yet the *Patent* good, and aided by the Statutes of 34 & 35 *H.* 8. of *Confirmations, &c.* but there not ſtood upon; but if the *Patent* had been of the Land, which the King had by the Attainder of *J. S.* or in a Releaſe in a Common Perſon's Caſe, of all ſuch Lands as diſcended, &c. there, although pleaded by a *Prædict'*, yet an *Averment* ought to be.

The like Learning, where ſufficient *Certainty* is in the Patent, as 3 & 4 *Mariæ* in *Waſt*, between *Wyburn* and *Dorril*.

The like in *Wortley*'s *Ejectione firmæ*, in *Plowden*; where the Grant was, of all that his Farm in the Occupation of *A.* needs no Averment of the Occupation.

But in *Throgmorton* and *Tracy*'s Caſe, his *Per Nomen* muſt not be direct contrary, or repugnant.

Continetur. Then, *Of the word* Continetur *in Pleading.*

Firſt, Holden 28 *H.* 6. 3. that to plead, *Quod patet* by the Obligation, That *A.* and *B.* was bound Joyntly, *ill*; but ought to ſay, *In facto*, that they were bound.

But 21 *H.*6.51.good Pleading of a Condition of an Obligation, *Quod patet ni dorſo, &c.* or, *Quod patet ni dorſo*, that part paid; but with a *Quære inde.*

And 1 *&* 2 *Mar. Dyer* 118. to plead, *Quod Indentura Teſtatur quod dimiſit*, ill.

As 21 *Ed.*4. 44. *Quod patet per Recordum, &c.* and in *Browing* and *Beaſton*'s Caſe, it was holden *ill*, to plead the Condition of a Leaſe by way of *Continetur* in the Indenture, although the ſaid Indenture is Confeſt in Pleading: Otherwiſe, if Entred, *de verbo in verbum.*

As 9 *H.* 6. to plead the Grant of a Rent, *cum Clauſula diſtrictionis.*

Prædict'. Then, *Touching the Pleading, by, or without the word* Prædict'.

And therefore, firſt, ſee 21 *H.*7. 30. where one pleaded a Releaſe *apud Villam* Weſtm', and after in the ſame Pleading, naming *Villam* Weſtm', did not ſay *Prædict'*; and yet the Juſtices held, That it ſhould be taken by Intendment to be in the ſame County.

Yet

Yet 5 *Ed.* 6. *Dyer* 7. the Plea, *Quod quidam J. S.* ſhall not be intended the ſame Perſon named before, but another.

And in the Caſe of *Throgmorton* and *Tracy*, in *Plowden*, on a Writ of *Second Deliverance*, one pleaded a Leaſe made *apud* Dale *Prædict'*, when not before mentioned, and *good.*

Notwithſtanding', in *News* and *Scholaſtica*'s Caſe, in the *Reports*, upon an *Aſſize*; the Writ having this word *Prædict* more than neceſſary, *Judgment* was therefore ſtayed; *quod nota.* *Nota bene.*

Then, as to this Word, *Ut*, in *Pleading*. Of the word, *Ut*, in Pleading.

It is ſaid 5 *H.* 7. 2. That in Pleading a *Diſcent* one ſhall ſay, That it did diſcend to him, *ut filio, &c.* or, as in a *Juſtification*, *Quod ipſe ut Ballivus, &c.* and need not to ſay in *Fait*, That he is Bailiff, or Heir.

But in a Special Verdict, in an *Aſſize*, 3 & 4 *Mar. Dyer* 132. found, That *J. S.* and *J. D. Ut Superviſores*, did Let, and doubted if good. Where a General Plea ſhall be pleaded for avoiding of Miſchief.

Vide 6 *Ed.* 4. 2. where the Condition of an Obligation was, *To ſerve one by Seven years, without abſenting himſelf at any time without Licenſe.* And the Defendant did plead, *Quod ſervivit per ſeptem Annos, & ſe non abſentavit per idem Tempus, ſine Licentia*; without ſhewing the Number of Years, he might be Licenſed more times.

And therefore in the Caſe between *Bulkley* and *Rice Thomas*, in *Plowden*'s *Com.* the Plaintiff did alledge, That he was Choſen Knight, *per Majorem Numerum*, without ſhewing the Number in certain; *quod nota.*

Of Pleading an *Entry*, &c.

Then, it appears 22 *H.* 6. 43. If one do alledge an *Abatement*, *Intruſion*, or *Diſſeiſin*, he ought to alledge it ſo Specially, and not, That the Party did Enter, &c. for that may be intended a Lawful Entry.

And ſo it is in *Plowden*'s *Com.* in the *Ejectione firmæ* brought by *Williams* againſt the Lord *Berkley*, touching the Pleading of an *Entry* upon him, and *Letting* to another; when he ſhould have ſaid, *That he did Enter, and him Diſſeiſe:* For by his Entry only he could not Let to the other, he being in Poſſeſſion; *quod nota.*

But in alledging an *Intruſion* for an *Abatement*, it hath not been holden, ſuch a Sufficient Matter to make the Plea, ill; *quod nota.*

Negative Pregnant.

Then, touching the Plea of *Negative Pregnant*, ſee before in Title *Iſſue*, there ſet down under the Diviſion of *Modo & forma*, and in the Special Title thereof in *Brook*'s *Abridgment.*

And ſee *Dyer* fo. 17. Num. 95.

But eſpecially *Plowden*'s *Commentaries*, fo. 121. That although the Plaintiff in his Declaration did but ſhew *quod licet*, he was Choſen Knight, *Per Majorem Numerum*; yet

yet holden *good*, and the moſt Eloquent Pleading: Where you may ſee alſo divers *Writs*, *Pleas*, and *Latin Authors* there Vouched, to prove the word *Licet* an Expreſs Affirmative.

Licet, an Expreſs Affirmative.

Then, *Where an expreſs Seiſin, or Poſſeſſion, muſt be alledged, and not implied, in Pleading.*

Expreſs *Seiſin*, or *Poſſeſſion* to be alledged, not implied.

For which ſee 9 *Eliz. Dyer* 257. where one brought an Action of *Covenant* upon this word *Demiſe*, declaring of a Leaſe by Tenant for Life to himſelf, ſhewing his Death alſo during the Term, and how that he in the Reverſion did Enter, and ouſt him; and Exception taken to the Declaration, for that he did not ſhew Expreſly, that he was poſſeſt, and after expulſt, but by Implication.

Where holden alſo, That this word *Demiſe*, doth not Charge the Executor.

Nota bene.

And in *Dyer* 9 & 10 *Eliz.* 254. one brought *Debt* upon a Leaſe made by himſelf to *A.* who Deviſed the ſame to the Defendant, who did Enter, and was poſſeſt: And Exception taken, becauſe he ſaid not, *Virtute cujus* he did *Enter* and was Poſſeſt; *becauſe he might Enter by reaſon of another Title.*

Of the words, *Virtute cujus*, or, *Per quod*, &c.

And in the *Sergeant*'s Caſe, in *Dyer* 7 *Ed.* 6. 83. where divers *Meſn* Steps and Degrees are ſhewed in the *Plaint*, how the *Tithes* came from the Abbot to the King's Hands; and that to ſay, *Quorum prætextu* is very good, and refers to all of them.

Quorum prætextu.

But as its ſaid 7 *H.*7. *Nec auget aut minuet ſententiam*; for there, by reaſon of *Virtute cujus*, it ſhall not be intended that the Uſe there alledged doth continue.

A Deed, how to be pleaded.

Then, *How a Deed ſhall be Pleaded.*

See 5 *Eliz. Dyer* 221. in a Writ of *Annuity* againſt the Succeſſor of a Prebend of *A.* granted by his Predeceſſor; he did Declare, That the Predeceſſor, *Per ſcriptum ſuum geren' dat' viceſimo die* Januarii, *& deliberat' eidem Quer' triceſimo die ejuſdem Menſis*; and did not ſay, *primo deliberat' ut Factum*; ſo that this word, *Suum*, doth ſuppoſe a perfect Deed 20 *Januarii*, at which time the Predeceſſor was not Inducted.

See, touching this Matter, a Caſe 1 *Eliz. Dyer* 167.

Of the Pleas, *Non eſt factum*, or *Riens paſſa.*

Then, *Of the Pleas*, Non eſt Factum, *or* Riens paſſa.

For which ſee, firſt, 1 *&* 2 *Mar. Dyer* 116. where in an *Ejectione firmæ* of Tithes, the Defendant pleaded a *Grant* and *Aſſignment* from the Plaintiff himſelf; and the Plaintiff, by his *Replication*, maintaining his *Count*, took a *Traverſe*, *Abſque hoc quod vendidit per prædictam Indenturam totum ſtatum, &c.* To which Exception was taken, That he, being privy to the Deed, ought to *Traverſe* the ſame, eſpecially when the thing granted doth not paſs without Deed.

But

But by *Stamford*, he ought to have pleaded, That he had nothing in the Term at the time of the Grant: As, in avoiding a *Releaſe*, to plead, That the Party to whom, &c. had nothing at the Time: Or, to have pleaded, *Non eſt Factum:* And for theſe Reaſons, and others, the Jury were diſcharged, and a *Replegiar'* awarded.

But touching this Matter, Whether he that is privy to a Deed may plead *Riens paſſa*; or where one Privy or *Eſtranger* ſhall plead, *Ne Enfeoffa*; or *Ne Granta pas per le Fait*; or, *Ne Charga pas, Ne Releſſa, Non eſt Factum, Nient Compriſe*, or the like, ſee accordingly in *Brook*, in his Title *Eſtraunge al Fait.*]

Where an *ill Plea* is made *good* by Reference to another.

Then, *Where a Plea in it ſelf is not good, but by Referring the ſame to another Plea.*

Firſt, See 28 *H.* 8. *Dyer* 27. in *Debt* upon an Obligation, brought by the Abbot of *Weſtminſter*, declaring the ſame to be made at *VVeſtminſter* 10 *die Novembris*, *Anno duodecimo* Henrici *Octavi:* To which the Defendant did plead, an *Indenture of Defeaſance*, not alledging any Date, or ſaying *poſt Confectionem ſcripti prædicti*; and the words in his Plea, *Eiſdem die & anno*, ſhall not be referr'd to the Date of the Obligation mentioned in the Plaintiff's Declaration; becauſe the Defendant is a Stranger to the ſame, and his Adverſary.

And further, If one of the Defendants in *Treſpaſs* plead a Releaſe of the Plaintiff *made after*, and the other plead a Releaſe alſo *Eiſdem die & Anno*; that's *ill.*

And 14 *H.* 7. one of the Defendants in a *Quare Impedit*, made Title as *Patron, &c.* and the *Incumbent* did plead, That he was Preſented by the other *ex Cauſa ſupradicta*; and *ill. Quære tamen.*

Of Pleading, *Prout per Indenturam*, or *Scriptum plenius liquet & apparet.*

And in the ſame Caſe its ſaid, That in Pleading an Indenture, he ſhall not need to ſay, *Prout per Indenturam prædictam plenius liquet*, or *apparet*; yet he may ſay ſo if he will.

And ſo is *Mich.* 7 & 8 *Eliz. Dyer* 242. in Pleading an *Arbitrement*; and likewiſe in Pleading the Covenants of an *Indenture*, or a *Record*, need not ſay, *Quæ ſunt omnia & ſingula*; as in pleading a Condition, to Enfeoff the Plaintiff of all my Lands in *Middleſex, &c.*

Quæ ſunt omnia, &c.

And 19 *Eliz. Dyer* the Defendant in an *Ejectione firmæ* did plead, That the Leſſor Deviſed to the Plaintiff for years, and then alledged in his Plea, a *Cuſtom* to deſtroy the ſame, and did not ſay in his pleading, *Quæ eſt eadem dimiſſio*; and *ill*, as it ſeems. *Quære inde.*

Quæ eſt eadem dimiſſio.

And ſee 29 *H.* 8. *Dyer* The Defendant in Waſt did Juſtify the Cutting of *Trees*, to Convert to Arable, *pro melioratione*, without ſhewing, *Quod eſt idem Vaſtum*; and Exception taken for that Cauſe.

Quod eſt idem Vaſtum.

And

And in the ſame Book *Mich.* 7 & 8 *Eliz. Dyer* 242. the Submiſſion was touching *Kelſtorne*, and the Arbitrement was of *Brokes* by another Name, and took an *Averment*, That the ſame Place and *Kelſtorne* being all one, and *ill*, without the uſual Courſe. *Et non al' neque diverſ.*

Et non alia neque diverſa.

In *Partridges* Caſe in *Plowden's Com.* fol. 77. *b.* is ſaid, *That Surpluſage in a Plea doth not make the ſame ill*, where was pleaded the Grant of a Houſe, and ten Acres to the ſame appertaining. And ſo of the word *Prædict'*, when the thing is not before ſpoken of.

Surpluſage.

Then ought to be obſerved, *That a man take care he Plead not his Cauſe, but in due Time, for otherwiſe it ſhall be taken for nothing.*

Pleading. *Devant ſon temps* or *Miſpleading.*

For which ſee in *Walſingham's* Caſe, in *Plowden's Commentaries*, where before it appeared in Pleading what Eſtate Sir *Thomas Wyat* had; he pleaded, that Sir *Thomas* had Iſſue yet living.

As if one Declaring upon an Obligation doth ſhew, That the Obligor was of full Age.

The like in Pleading a *Feoffment* to ſay, *It was Simple, and without Condition*; and if Iſſue be taken upon the ſame, it is *Miſpleading* and a *Jeofail.*

Then

Un Plea fait autre bon.

Then ſhall be ſhewn, *Where an Ill Plea may be made good by Admittance.*

For which ſee, firſt, 29 *H.* 8. *Dyer* 39. In Debt upon an Obligation, not Declaring at what Place, and the Defendant pleaded a Releaſe; the Declaration good.

The like 18 *Ed.* 4. 17. If in Debt the Plaintiff Count in like manner of a Leaſe for years, and the Defendant pleads, *Non dimiſit*; but otherwiſe it would have been, if he had demurr'd: But more queſtion, as the Caſe was there in *Dyer*, in an Appeal againſt an Acceſſary, declaring his Notice in another County, to which the Defendant did demur in Law: For by Demurring all Matters in *Fait*, contained in a Declaration, or Pleading, are Confeſt.

As if the Defendant in an *Ejectione firmæ*, will Confeſs and Avoid the Plaintiff's Leaſe, by ſaying, *It was made by Tenant for Life*, although his Plea be otherwiſe apparently ill, and the Plaintiff demur upon the ſame.

And ſee 6 *H.* 7. 10. where the Defendant in *Treſpaſs* did plead a *Concord* to do *Two things*, and pleaded the *doing of One*; and the Plaintiff Replied, *Nul tiel Concord*; and found for the Plaintiff, and yet taken to be a *Feofail* by the Court: For that the *Bar* is not good to any Intent; becauſe a *Concord* without *Satisfaction*, is an apparent ill Plea in the Law: And where there ſhall be ſuch an ill *Plea*, that is not good to any intent, a *Replication* or a *Verdict* cannot make it good.

Feofail.

But

But it is otherwiſe where the *Bar* is good to ſome Intent, and to other Intent not: As in this Plea, *Riens entermains Four del' Brief Purchaſe*, or *Nontenure*, in like form, without ſaying, *Ou, ne unque puis*, there the *Replication*, *Aſſets*, or *Tout Four del Brief*; and Verdict thereupon will make it good, becauſe good to ſome Intent.

Vide 12 *Ed.* 4. 6. where an ill Iſſue; as *Negative pregnant*, *Double Plea*, or the like; and found with the ſame, is made good by the Verdict: Otherwiſe, if found againſt it.

See more hereof in the Titles of *Repleaders* and *Feofails*, as alſo of *Verdicts*.

And Note, That the Defendant in Time may waive his *Pleading*, and betake him to the *General Iſſue*.

As 34 *H.* 6. 29. the Defendant in an *Aſſize* did plead in *Bar*, and although the ſame was Entred, and in another *Term*, yet he pleaded the *General Iſſue*.

And ſee *Mich.* 9 & 10 *Eliz. Dyer* 265. the Defendant did *Wage his Law*, and at the Day would have *Confeſt* for part, and Waged his Law for the reſt; and by the Better Opinion could not, nor Waive his Law, and plead to the Country, without the Conſent of the Plaintiff, as it ſeems.

For which, ſee more in the Title of *Waiver*, in *Brook*:

As namely there 31 *Ed.* 1. The Tenant did Vouch one who was found; and yet he afterwards Waived his *Vouchee*, and pleaded the *General Iſſue*.

So

So there 4 *Ed.* 4. 28. touching *Aid Prayer.*

And 4 *Ed.* 3. 56. one that doth Counterplead the Voucher, may at another Day *waive* the ſame, and admit the Vouchee.

And ſee there alſo, That he who pleadeth to the Writ, or in Bar, may afterwards *waive* the ſame, and plead the General Iſſue.

Quære, If after Iſſue, or Demurrer Entred.

For by the Book of 11 *R.* 2. *Fitz. Iſſue* 146. after Demurrer, without Conſent of the Parties, the Defendant cannot *waive* the ſame, and plead the General Iſſue.

And ſo ſeems 50 *Ed.* 3. 19. If one plead to the Writ in an *Aſſize*, whereupon *Iſſue* is Joyned, and *Adjorn'd* for Trial, he cannot *waive* the ſame, and Plead in Bar.

Quære, If altogether in reſpect of the Adjornment; for otherwiſe it were an advantage for the Plaintiff to have his Writ Confeſt to be good.

Eſtoppel. And 50 *Ed.* 3. 19. the Defendant in *Coſinage* did plead an *Eſtoppel*: Judgment, if the Plaintiff ſhall be received to ſay, *That his Father died ſeiſed*; and the Plaintiff did Confeſs and Avoid the *Eſtoppel*, and therefore the Tenant would have *waived* his Plea, and pleaded in *Bar*, and could not; but ſaid there, That he might well do it in an *Aſſize de Mort d'Anceſtor*: *Nota diverſitatem.*

And ſee the ſame Book of 50 *Ed.* 3. 19. and ſundry other Books, and Experience, That after Plea by *Baily*, the Defendant in Perſon,

Perſon, or by an Attorney, may plead *Matter* in *Bar*, whereof a Certificate of an *Aſſize* doth lye.

But 3 *H.*6.16. if an *Infant* plead by *Guardian*, he may afterwards come in Perſon, and Plead himſelf at his pleaſure: For that the Admittance of a Guardian for him is the Act of the Court, which ſhall in no caſe prejudice him.

And alſo ſee 5 *Ed.*4. 122. The King after Demurrer entred by himſelf, may *waive* the ſame by his Prerogative, and take Iſſue.

And ſo is 28 *H.*6. 2. and that he may Declare, *de Novo*, the ſame Term; but not in another.

But ſee in the Title *Prerogative* 116. That in an *Information* he ſhall not *waive* his Iſſue, and Demur; but otherwiſe upon a *Traverſe*.

And ſee accordingly in *Plowden's Com.* in *Partridge's* Caſe, touching his *waiving* of Demurrer, and taking Iſſue; and *è contra*: But if another Party be joyned with the King, as there, then the King ſhall have no advantage.

CHAP.

CHAP. VII.

Of Repleaders and Jeofails.

Repleader. THen the Learning touching *Repleaders* and *Jeofails*, ought to be known. And,

Its Cauſe. Firſt, Touching the Cauſe of *Repleaders*; which is, for *that the Pleading hath been ill and vicious*, or *the Iſſue miſjoyned*, and then its called a *Jeofail.*

Jeofail, what. Or, as 22 & 23 *H.* 6. and other Books, where part of the Matter contained in the Plaintiff's Suit, is Omitted to be anſwered, and the like.

But as 6 *Ed.* 4. 2. If an ill Plea be made good afterwards by Admittance (as hath been ſaid before) that is no Cauſe of *Repleader.*

But otherwiſe, as it ſeems by the Books of 7 *Ed.* 4. 1. and 35 *H.* 8. The *Court* (the *Jeofail.* Jury being at the Bar) if there be a *Jeofail* apparent in the Record, will diſcharge the Jury.

And this *Repleader*, for the moſt part, hath been upon *Miſjoyning* of Iſſues, or before Demurrer, and not after.

Yet 9 *H.* 6. 35. in a *Replevin*, the Defendant did plead an *ill Bar*, and the Plaintiff a *worſe Replication*; whereupon the Defendant did Demur, and a *Repleader* awarded.

And

And ſo is *Dyer* 3 & 4 *Mar.* 139. the like; If the *Rejoynder* had been ill, and they ſhall begin at the firſt *ill Plea.*

But ſee *Plowden*, in *Treſpaſs*, brought by *Hill* againſt *Grange*, That the Plaintiff Demurring upon the Rejoynder, his Replication being good, Judgment ſhall be gien for or againſt him, as the Law doth fall out. But his Replication being ill, it ſeems there, that they ſhall Replead.

Quære inde; for at this time greatly doubted, Whether Judgment ſhall not, in like caſe, be given againſt him that pleadeth the firſt ill Plea: For, by the greater Opinion, no Repleader after Demurrer.

And in *Smith* and *Hart*'s Caſe, 31 *Eliz.* the Avowry being good, and the Bar and Rejoynder in a Replevin ill, no Repleader after a Demurrer: But if the Declaration be ill, or ſuch an Avowry, which is in nature of a Declaration; or, by that Reaſon, a Replication where no Title is made in the Declaration; there Judgment ſhall be given againſt the Plaintiff without any Repleader. *Quære tamen.*

Then, *Where the Parties ſhall begin to Replead.* At what Plea the Parties ſhall begin to Replead.

The ſame Book, 9 *H.* 6. ſaith, At that Plea which firſt was faulty; and ſo is 21 *H.* 6. 14. 22 *H.* 6. 19. and 5 *Ed.* 4. 18.

And by that Book 22 *H.* 6. it appears, That an Iſſue in an *Aſſize*, Adjourned in the Common-Pleas to be Tried, in which pleading there was a *Jeofail*, the Parties ſhall Re- In what Place.

Re-plead in the *Bench*, and not be Remanded to Replead in the *Country*; *quod nota.*

At what time. Then, *At what time they ſhall Replead.*

For which ſee 22 *H.* 6. 57. where *Miſpleading* was, and the Parties after Verdict, by *Niſi prius*, were awarded to Replead; *quod nota.*

Where its ſaid alſo, That it hath been often ſo uſed until Judgment, although the Defendant have no Day in Court to be demanded.

And ſee in *Brook*, in this Title 39, in Abridging the ſame Caſe 9 *H.* 6. That after the Defendant hath Confeſt the Action, yet there may be a Repleader.

Statutes aiding *Jeofails*, or *Miſ-pleadings.* Theſe *Miſ-pleadings*, in ſome ſort, are Aided by the Statutes of *Jeofails*, of which there be four in number; namely,

Anno 32 *H.*8. *cap.*30.
Anno 18 *Eliz. cap.*14.
Anno 21 *Jac.*1.*cap.*13. *&*
Annis 16 *&* 17 *Car.*2.*cap.*2.

32 *H.*8.*cap.*30. The, firſt, after this manner, *viz.* That 'upon Iſſues tried in any the King's Courts 'of Record, Judgment ſhall be given, any 'Miſ-pleading, want of Colour, Inſufficient 'Pleading, Jeofail, Miſ-continuance, Diſ-'continuance, Miſ-conveyance of Proceſs, Miſ-'joyning of Iſſues, want of Warrant of At-'torney for the Party againſt whom, &c. or 'other default of the Parties, their Coun-'ſellors, &c.

The

The Second, namely, 18 *Eliz. cap.* 14. to this purpose, *viz.* 'After Verdict, upon Action in any Court of Record, notwithstanding default of Form, False Latin, or Variance from the Register, or other default in Form in Writs Original or Judicial, Count, Declaration, Bill, Plaint, Suit, or Demand, or Want of Original or Judicial Writ, Imperfect or Insufficient Retorn, Want of Warrant of Attorney, Default in Proces upon, or after, any Aid Prayer or Voucher; but not to extend to Informations: As by the two first Statutes may appear. 18 *Eliz. cap.* 14.

Now hereupon it is observed, That neither of the two Statutes, above-recited, extends to Aid any person before, but after Verdict, and not upon Demurrer.

And that the Statute of 32 *H.* 8. which goeth only to Defaults in Pleading and Matters therein mentioned, and not to Declarations, extends but to the Kings Courts of Record, and not to other Inferiour Courts.

But touching *Mis-pleading*, and the Matters therein mentioned, it helpeth in Indictments and Informations after Verdict, which the Statute of 18 *Eliz.* doth not, but Aids only in Declarations, Writs, and the Cases therein particularly set down; *quod nota.*

Out of both which Statutes, of 32 *H.* 8. and 18 *Eliz.* have ſince been taken divers Caſes, as namely upon the firſt Statute, if no Iſſue be joyned at all; or as a Report 8 *Eliz.* by *Catlyn*, where an Iſſue is joyned that is not proper to the Action, as *Not Guilty*, in *Debt*.

See, touching that, the Book 28 *Eliz.* *Dyer* 347. where *Not Guilty* is pleaded upon an Information of Uſury. The like upon the Statute of 18 *Eliz.* if the Declaration be ill for Matter.

As if Tenant for Life doth bring a *Quod permittat* in the *Debet* only, when the ſame ought to be in the *Debet* and *Solet*: And Agreed by all the Court 31 *Eliz.* where the *Venire facias* to the *Coroners*, without Cauſe at all; or, as the Caſe there lies, where the Juſtices of *Niſi prius* awarded to the Coroners a *Tales*, and Verdict thereupon, which was no ſuch *Miſ-continuance* of *Proceſs*, as is helped by the Statute of 32 *H.* 8.

So if the Trial be in a wrong County.

Quære tamen inde, for *Mich.* 2 & 3 *Eliz.* *Dyer* 188. and *Mich.* 21 & 22 *Eliz.* *ibid.* 367. ſeem contrary, although Proceſs awarded to the *Coroners* without Cauſe; and although (as the firſt of the ſaid two Books is) the Trial was not between the Parties to the Writ; but between the Tenant and the Vouchee.

Yet

Yet *Anno* 32 *Eliz.* it was ſaid to be Ruled, That if one pleadeth an Award in *Treſpaſs* without Satisfaction and Iſſue, and Verdict taken upon the ſame, yet not helped by that Statute; *quære inde.*

And *Mich.* 33 *Eliz.* in the Caſe between *Upton* and *Walſh*, no *Venire facias* being put upon the File, Ruled to be aided by the Statute, although it could not be found.

See a Report 1 & 2 *Mariæ*, where the Declaration doth not warant the Writ: As in *Debt*, where it doth appear, that the Day is not yet come; or in *Treſpaſs*, that the ſame is committed after the Date of the Writ; or, a *Declaration* be in the *Debet* and *Detinet*, by an *Executor*. The ſame, and the like, although Iſſue and Verdict thereupon, are not helped by the Statute of 32 *H.* 8.

Note, by what hath been ſaid, it appears, That the ſaid Statute of 32 *H.* 8. being (touching *Miſ-pleading*, and the Matters therein contained) in any of the King's Courts of Record, that the ſame helpeth not, in that Caſe, in any other Court of Record.

For, as it ſeems in *Stradling*'s Caſe, in *Plowden*'s *Commentaries*, If a Statute give an Action in any of the King's Courts of Record, the ſame will not extend to *Oxford*, although the Style be *Cur' Domini Regis*, or to the *Exchequer* or *Chancery*.

And yet if a Statute provides Remedy for a thing by an Action that lay before (as it appears in *Bro.* Tit. *Conuſance,*) and doth not limit by Expreſs Terms where the Suit ſhall lye, there it will lye in any of the ſaid Courts.

In which, if the Law be ſo, then touching *Miſ-pleading* and *Miſ-joyning* of Iſſues in other Courts, the ſame is, as it was at the Common Law before the Statute of 32 *H.* 8.

Of Matters Remediable by the Statutes of *Jeofails.*

See *Trin.* 29 *Eliz. Goldsborough's Reports* 48. where, in *Caſe ſur Aſſumpſit*, the Defendant pleaded *Non Aſſumpſit*, and found for the Plaintiff; and Moved, There's no Place laid in the Declaration, where the Promiſe was made; and its there ſaid, That when an *Iſſue* is Miſ-tryed, it is not helped by the Statute, and here no place is alledged, whereupon the Trial may be had: But *per Cur.* the Statute ſhall be taken liberally; ſo that if the Verdict be once given, it ſhall be a great Cauſe that ſhall hinder the Judgment; for when it is Tried and Found for the Plaintiff, he ought to have Judgment.

And *Trin.* 10 *Jac.* 1. *Godbolt* 194. In an Action brought in the *Common Pleas*, after Verdict moved to ſtay Judgment, that the *Venire facias* did vary from the Roll in the Plaintiff's Name; for that the Roll was *Peter*, and the *Venire*, *John*, and the *Poſtea* agreed with the Roll, his true Name: Where holden, That if no *Venire* goes forth, the ſame is aided by the Statute of *Jeofails*; and

and it is in Effect here, as if there were no *Venire fac.* or *Hab. Corpora*; yet, if the Sheriff do Return a Jury, the ſame is helped by the Statute of *Jeofails*.

And *Paſch.* 12 *Jac. Brownl.* 2 Part 167. Upon a Motion to *ſtay Judgment*, it was Objected, That the words, *Et habeas ibi Nomina Jur'*, were omitted in the *Venire fac'*, but *Venire fac' Duodecim, &c.* were in the Writ, and good *per totam Curiam*; for that the firſt words are ſupplied by the laſt, and the Omiſſion helped by the Statute of *Jeofails*, after Verdict.

And ſee *Mich.* 21 *Jac. Cro.* 2 Part 672. In Caſe for Words, brought in *Chancery* by a Clerk there, a *Venire* was awarded Retornable in *B. R.* in this Form; *viz. Venire facias duodecim quorum quilibet habet* 4 l. *terrarum, aut minus, &c.* Moved to ſtay Judgment, that the *Venire* was ill, and not helped by the Statute of 27 *Eliz. c.* 6. for that extends only to Writs of *Venire fac.* in the *Kings-Bench, Common-Pleas,* [*Exchequer**,] *Juſtices of Aſſize*, and no other Courts, and the *Chancery* is omitted, and therefore the *Venire* not waranted by the Statute. But *per Cur.* This Clauſe inſerted in the Writ, although not waranted by the Statute, yet is not prejudicial to any, but makes the better Trial.

* Excepted in *Stradling's* Caſe before, pag. 179.

And, by the Common Law, the Judges may direct a *Venire*, to be *Quorum quilibet habeat tantum de Terris*; and Precedents were ſhewed out of *Chancery*, where the *Venire* was, as in this Caſe.

And *per Cur.* If it was not good at the Common Law; yet now clearly made good by 32 *H.* 8. Wherefore Adjudged *pro Quer.*

So *Trin.* 9 *Car.* 1. *Cro.* 1 Part 215, & 228. In a *Scire facias* in *Chancery* againſt *C.* upon a Recognizance of 200 *l.* The Defendant was Returned *Dead*, whereupon a Second *Scire facias* iſſued againſt the Heir of *C.* and the Tenants of the Lands of *C. tempore Recognitionis*; upon which the Sheriff Returned *T.* Terr-Tenant of ſuch Lands, omitted to Return any thing concerning the *Heir:* Whereupon the Defendant pleaded, That he had nothing in the Lands at the time of the Recognizance, nor ever after.

It was found for the Plaintiff, that *C.* was ſeiſed, and moved in Arreſt of Judgment; becauſe nothing was Returned againſt the *Heir, viz.* That there was not *any Heir*, or the *Heir had nothing:* And it is a *Non-Return* of the Sheriff, and not a *Miſ-Return*, and is not helped by the Statute of *Jeofails.*

But *per Cur'*, Though the Return had been better, if it had been found who was Heir, and that he was Warned, or that there was not any Heir in the ſaid County; yet it was well enough, and the *Miſ-Return* or *Inſufficient-Return* of the Sheriff, *quoad* the *Heir* (not being named in the Retnrn) is but a *Diſ-continuance*, helped by the Statute of *Jeofails.*

Vide

Vide Hob. 326. Where the Plaintiff Declared in *Debt*, upon a Demiſe for Rent: To which the Defendant pleaded, That before the Rent became due, the Plaintiff did Enter upon him, not ſaying, *He did Expel*, or *Hold him out*; ſo that Iſſue was only, *Quod Quer' non Intravit*; and found for the Defendant, and Judgment given for him: For tho' the Plea was Inſufficient; yet the Verdict did fully anſwer the Iſſue.

And ſee *Hob.* 76. *Banks* verſus *Parker*, In *Treſpaſs*, for taking a Kettle at *W.* The Defendant Juſtified, by reaſon of the Cuſtom of the Mannor of *T.* And the Plaintiff took Iſſue *de Injuria ſua propria abſque tali Cauſa*; and the *Vexire* was awarded *de Viſn' de* W. *& Manerio de* T. upon the Roll, and a Verdict for the Plaintiff: And tho' the Plaintiff ſhould not have Traverſed the Cauſe generally, but the Cuſtom; yet that was Adjudged to be helped by the Statute of *Jeofails*, as Matter of Form; becauſe *Abſque tali Cauſa* contained the Cuſtom, and more.

And *Idem ibid. Parker* verſus *Parker*, The Plaintiff brought *Trover* and *Converſion* of certain Goods againſt the Defendant, and the Declaration was Entred upon the Imparlance-Roll, with Blanks or Spaces for the Day and Year of the Plaintiff's loſing the Goods, and of the Defendant's finding and converting them to his own proper uſe; but the Iſſue-Roll, and the other Proceedings were perfect in this Point.

And *per Cur'*, the Imparlance-Roll, being the Original, cannot be made perfect by the Iſſue-Roll, which was waranted by it; but in regard a Verdict was given for the Plaintiff, upon the Iſſue of *Not Guilty*, the Court gave Judgment for him: For the Declaration, as Entred on the Imparlance-Roll, was good enough in Subſtance; for the *Trover* and *Converſion* being laid in the *Præterperfect Tenſe*, was before the Action brought, and ſo the Fault in the Declaration being only in Form, is helped by the Statute of *Jeofails*.

And *Idem* 117. *Napper* verſus *Jaſper* and *George*; where Iſſue was taken in *Treſpaſs* upon a Preſcription, That *J.S.* Prebendary of the Prebend of *P.* in the Church of *S.* and all his Predeceſſors, Prebendaries, &c. had uſed Time out of Mind, to keep a Shepherd for certain Sheep of theirs, following the ſame Sheep, for the better keeping of them feeding together in a certain Paſture, from the Sheep of the Earl of *S.* in the ſame Place; and the Iſſue was found accordingly: And Moved, That this was a Void Verdict; for the Preſcription was ſenſleſs, and could not ſtand, That the Sheep could be kept Time out of Mind, from the Sheep of the Earl of *S.* being but one man's Life.

But yet the Plaintiff had Judgment according to the Verdict; for the Subſtance of the Iſſue was, *The keeping the Prebendaries Sheep feeding together*, and the other part was but a Conſequent of it, *That by that means*

means they were kept from the Earl's Sheep.

Vide Stiles Rep. 206. where the Plaintiff declar'd upon an Aſſault and Battery in *Surrey:* To which the Defendant pleaded Juſtification in *Middleſex*; and the Plaintiff Replied, That the Defendant did Beat him in *Southwark*, which is in *Surrey*, *de Injuria ſua propria, abſque tali Cauſa*; and the Iſſue was tryed by a Jury in *Middleſex*, and found for the Plaintiff; and Objected, That the Trial was not good, becauſe the *Venire facias* was from one Place, when it ſhould have been from both; for here are two Iſſues to be Tried, and ſo not within the Statute of *Jeofails*.

But *per Cur'*, the Trial is well enough, for tho' two Iſſues, yet by Pleading they are made one, and ſo within the Statute of *Jeofails*, and helped by it.

And ſee *Godbolt* 85. where the Plaintiff declared in Account of divers Receipts and Parcels: To all which, except one, the Defendant pleaded to Iſſue, but for that one Parcel he pleaded nothing: Whereupon it was Moved, That the Plea was *Diſ-continued* for not anſwering to that Parcel, which *Diſ-continuance* was not aided by the Statute of 32 *H.*8. and the Plaintiff could not have Judgment according to his Declaration, becauſe of the Parcel to which no Anſwer was made, no Judgment could be given.

But

But *per Cur'*, the Statute of 32 *H.* 8. did Extend to it; for the words of that Statute are,—*After Verdict found Judgment ſhall be given, any Diſcontinuace notwithſtanding.*

And ſee *Cro.* Part 2. 534. where the Plaintiff declar'd in *Treſpaſs*,—*Quare Clauſum fregit, Et alia Enormia ei intulit:* The Defendant pleaded the General Iſſue, *Non Culp.* and the Jury found 400 *l.* Damages, in reſpect of the Abuſe done by the Defendant to the Plaintiff's Wife; and to ſtay Judgment, it was moved, that the *Venire facias* wanted theſe words,—*Quilibet Jur' per Pleg'*, and therefore is, as if there had been no Return of the Writ.

But *per Cur'*, this is not a Blank Return, where no Return is at all, or where the Name of the Sheriff is omitted; but this is an Inſufficient Return, helped by the Statute of *Jeofails*: For the Omiſſion of the Pledges, is but want of Form, and not like to *Huſſey*'s Caſe, where there was no Pledges Returned upon the *Original.*

And *Idem* Part 2. 353. where the Plaintiff did declare in *Treſpaſs* againſt the Defendant, for Entring his Cloſe and Houſe in *G.* To which the Defendant pleaded in Juſtification, That the Sheriff had directed a Warrant to him upon a *Capias Utlagatum*, to Take one *J. S.* who (as the Common Voice went) was at the Plaintiff's Houſe; whereupon he went thither in a *Foot-Path* through the ſaid *Cloſe*, and asked the Plaintiff's Leave to Enter his Houſe, to ſearch for the ſaid *J. S.* and the Plaintiff giving him

him Leave, he Entred the ſame, and not finding *J. S.* there, returned the ſame way: The Plaintiff took Iſſue upon the Licenſe, and had a Verdict; and to ſtay Judgment, it was Objected, That there was not any Replication for the *Cloſe*, or any Iſſue joyn'd thereupon; ſo that all was *Diſcontinued.*

But *per Cur'*, Judgment ſhall be given for that which is found; and that which is *Diſcontinued*, is helped by the Statute of *Jeofails.*

Vide Hob. 176. where in *Treſpaſs* the Defendant did plead, That *Locus in quo* (no Place being aſſigned) was two Acres called *B.* in *L.* which was his Freehold. And the Plaintiff Replied, That *Locus in quo*, was a Piece of Land containing Twenty Acres, *Al' quam, &c.* To which the Defendant Rejoyn'd, *Quoad aliquam Tranſgr' in prædict' viginti Acris——Non Culp'.* Upon which the Plaintiff joyn'd Iſſue, and the Verdict found for him: And to ſtay Judgment, the Defendant moved, That this was *no Iſſue*; for there was *no Twenty Acres*, nor Place certain in the Declaration.

Yet *per Cur'*, the Plaintiff ſhall have Judgment; for tho' it be not in the Declaration, yet cannot be ſaid a *Departure* from the Declaration, for both Parties agree the *Treſpaſs* to be done at *L.* and ſo no *Verdict* out of the Matter, nor *Iſſue*; but a *Verdict* help'd by the Statute of *Jeofails.*

And

And ſee *Goldesbrough's Rep.* 158. where in *Treſpaſs*, for Entring the Plaintiff's Houſe, and breaking his Cloſe, the Defendant pleaded, That the Houſe and Cloſe contain'd Twenty Acres, and was his Freehold: To which the Plaintiff Reply'd, —— *Quod locus in quo eſt unum Meſuagium*, to which he Entitles himſelf; and becauſe by his Replication he only made Title to a Meſſuage, and did not maintain his Declaration, which was the Meſuage and Cloſe, Awarded *Nil Capiat per Billam.*

Quære, If this amounts to any more, than a *Diſcontinuance* of the Cloſe only, and ſo help'd by the Verdict.

But *Cro.* Part 2. 528. In Debt upon four Bonds, for payment of Mony, three of them were Tried in *London* in *Trinity Term*, and the fourth at *Lent Aſſizes* after; and there was not any Continuance from *Trinity Term* to *Lent Aſſizes*, which was much inſiſted upon; yet the Court gave Judgment for the Plaintiff.

So *Brownlow's Rep.* Part 1. fo. 81. a Bill was Exhibited againſt one of the Clerks of the Court of *Kings-Bench* for Mony due upon Bond; and Iſſue being joyn'd, the Cauſe was Tried, and found for the Plaintiff: And to ſtay Judgment it was Objected, That the Bill not being filed, was not helped by the Statute of *Jeofails*, nor within the ſame.

To

To which Opinion the Court ſeemed to Incline; but gave leave to the Plaintiff, to File a Bill, that ſo the Matter might be put to Arbitration.

So *Hob.* 181. a Bill was Exhibited in *Debt* againſt an Attorney of the *Common Pleas*, upon which a Verdict was had for the Plaintiff; and to ſtay Judgment it was Objected, That the Original Bill was not Filed with the *Cuſtos Brevium*, as it ought to be: But becauſe the Tenor of the Bill was Entred of Record *in hæc verba*, it ſeem'd to be in the Nature of the want of an Original after Verdict, and ſo help'd by the Statute of *Jeofails*.

To which Opinion the Court did incline; but would Adviſe of it, becauſe it had been otherwiſe Adjudged in that Court before.

But then we ſhall Enquire, *What Matters are not Remedied or Helped by any, or either of the Statutes of* 32 H. 8. *and* 18 El. *before-mentioned.* Matters not Remedied by the Statute.

For which ſee, firſt, *Goldesbrough's Rep.* fo. 49. where the Plaintiff brought his Action againſt the Defendant for an *Aſſault* and *Battery*; and the Defendant was Condemned therein by *Nichil dicit*, and a Writ of *Enquiry of Damages* iſſued out; and then the Plaintiff's Attorney died, and another Attorney, without Warant, prayed the Second Judgment, and had Execution thereupon.

Cur'

Cur', If the Attorney dies after Judgment, a New Attorney may pray Execution without Warant; but here the Attorney died before the Second Judgment, and therefore he that comes after, ought to have a Warant of Attorney.

Prothon. If one of the Parties dies after Judgment, the Writ ſhall abate.

And *per Cur'*, This is not within the Statute of *Jeofails*; for a *Verdict* is that, which is put in Iſſue by the Joyning of the Parties.

So *Hob.* 112, 113. The Plaintiff declared in Treſpaſs for an *Aſſault* and *Battery* made upon him by the Defendant, who pleaded *Juſtification*, and Conveyed an Eſtate to himſelf by Copy of *Court-Roll* in a certain Piece of Ground, Parcel of the Mannor of *D.* whereof *J. S.* was ſeiſed in Fee; and becauſe the Plaintiff came upon it, he laid his Hands *mollister* upon him.

And the Plaintiff, in his Replication alſo, Convey'd to himſelf an Eſtate by Copy of *Court-Roll* to another Piece of Ground within the ſaid Mannor, and lays a Preſcription in the ſaid *J. S.* Lord of the Mannor, to have a Way over the Defendant's Piece of Ground: Upon which they were at Iſſue, and Verdict for the Plaintiff.

And *per Melieur Opinion*, this was no Iſſue at all, nor Thing, nor poſſibly Iſſuable, and therefore the Verdict muſt alſo be void, and ſo not holpen by the Statute of *Jeofails*: For a Verdict cannot make that good, which the Court ſees cannot be in Law;

ſo

ſo that this is in the Office of the Court to judge.

So *Cro.* Part 2. 526. In Treſpaſs brought in the *Kings-Bench*, for Taking and Carrying away three Loads of Wheat, ſet out for Tithes, *contra Pacem Domini Regis*, the words *Vi & Armis* were omitted.

Per Cur', the Bill ſhall abate, for it is the Eſſential part of the Declaration, and that which induceth the Court to ſet a Fine for the King, and it is not help'd by the Statute of *Jeofails*: And ſo Adjudged *Hill.* 13 *Jac.* in the Caſe between *Welſted* and *Taylor*, where Judgment was Reverſed, becauſe *Vi & Armis* was omitted.

Vide Hob. 127. In Debt upon the Statute of 21 *H.* 8. the Writ was, *Præcipe* A. *quod reddat Nobis &* B. *qui tam pro Nobis, quam pro ſeipſo ſequitur Centum & decem Libras, quas Nobis & præfat'* B. *debet.* And the Count was, for Taking to Farm ſix Acres of Land, and holding the ſame for ſix Months, *Per quod Actio accrevit*, for 60 *l.* And for further Taking to Farm other Lands, and holding the ſame for five Months, *Per quod Actio accrevit*, for 50 *l.* To which the Defendant pleaded, —*Quod ipſe non debet præfat'* B. *qui tam, &c. prædictas Centum & decem Libras, neque aliquem inde Denarium in forma qua, &c.* whereupon Iſſue was Joyned, and the Jury found, That the Defendant did owe 30 *l.* and for the Reſidue —*Quod non debet*,

And

And to ſtay Judgment, it was Objected,

(1) That the Verdict expreſſes not for which Farm, nor which of the Months the 30 *l.* was due; *ſed non allocatur*, for the Demand and Iſſue were for 110 *l.* in ſeveral, tho' it would have been more formal to have diſtinguiſhed them.

(2) The Defendant hath not Anſwered the Writ and Declaration, for the Plea ought to have been as the Demand is, ——*Quod ipſe non debet dicto Domino Regi, & præfat'* B. *qui tam, &c.* And this was allowed, becauſe Penal Laws are Excepted out of the Statute of *Jeofails*.

And ſee *Hob.* 101. where Judgment was Reverſed, becauſe there were no *Pledges to Proſecute* Entred for the Plaintiff, and ſo not within the Statute of *Jeofails*; becauſe a Penal Law excepted out of the ſame.

But ſee *Trin.* 30 *Eliz.* in *Com. B. Goldeſbrough* 90. where a Writ of *Right* was brought againſt *Baron & Feme*, of two parts of Forty Acres of Land in *S.* who pleaded, That *J. S.* was ſeiſed, and deviſed to his Wife one of the Tenants for Life, the Remainder to *B.* in Fee, who was his Heir, who died, and they prayed in Aid of *B.* who joyned in Aid with them, and then they came and pleaded to the *Grand Aſſize*; and the firſt Day of the Term the *Aſſize* appeared, and ſixteen of them were Sworn, whereof four were Knights, the reſt Eſquires and Gentlemen; and the Title was, as befor in *Trinity Term, Anno* 28. for *B.* was Tenant

Tenant in that other Action for the Third part.

Per Cur', This is not aided by the Statute, for here is no Certainty in the Grant; yet if the Thing granted had had a certain Name given to it, as *Black-Acre*, or the like; then, tho' the Pariſh had been miſtaken, it would have been good enough.

See more of theſe two *Statutes* of 32 *H.*8. and 18 *Eliz.* after, in the Title *Error.*

In the next place, *We ſhall take a view of the two laſt Statutes, concerning Jeofails*, viz.

21 Jac. 1. cap. 13 & 16. *and*
17 Car. 2. cap. 8.

and enquire, what Miſ-pleadings *are aided by the ſame, and what are not.*

By the Statute of 21 *Jac.* 1. *cap.* 13. after Verdict given in any Court of Record, the Judgment thereupon ſhall not be ſtayed, or reverſed for any Variance in Form only, between the Original Writ or Bill, and the Declaration, Plaint, or Demand, or for lack of an Averment of the Parties Life, or Lives, ſo as it be proved he or they be in Life; or for that the *Venire facias*, *Habeas Corpora*, or *Diſtringas*, was awarded to a wrong Officer, upon an Inſufficient Suggeſtion; or that the *Viſne* was in ſome part Miſ-awarded, or ſued out of more or fewer places than it ought to be, ſo as ſome one place be right named; or for Miſ-naming any of the Jurors, either in the Sir-name or Addition, in any of the Writs or Returns thereof, ſo as *Conſtat de perſona*; or for want

Stat. 21 *Jac.* concerning *Jeofails.*

of a Return of any of the ſaid Writs, ſo as a Panel be returned and annexed thereunto; or for that the Officer's Name is not ſet to the Return, ſo as it appears by Proof that the Writ was returned by him; or by reaſon that the Plaintiff, in an *Ejectione firmæ*, or in any Perſonal Action, being under Age, did appear by Attorney, and the Verdict paſs for him.

This Act ſhall not extend to any Writ, Declaration or Suit of Appeal of *Felony* or *Murder*, nor to any Indictment or Preſentment of *Felony*, *Murder*, or *Treaſon*, nor to any Proceſs upon any of them; nor to any Writ, Bill, Action or Information upon any Penal Statute.

Stat. 16 & 17 *Car.* 2. concering *Jeofails.*

And by 16 & 17 *Car.* 2. *cap.* 8. it is Enacted, That after Verdict Judgment ſhall not be ſtayed nor reverſed in the King's Courts of Record at *Weſtminſter*, or Courts of Record in the Counties Palatine of *Cheſter*, *Lancaſter*, or *Durham*, or Courts of the great Seſſions, in any of the Twelve Shires of *Wales*, for default of Form, lack of Pledges; or but one Pledge to Proſecute, Returned on the Original Writ, for default of Entry of Pledges upon a Bill or Declaration; or for default of bringing into any Court, of any Bond, Bill, Indenture, or other Deed, mentioned in the Pleading; or for lack of Allegation, of bringing into Court of Letters Teſtamentary, or Letters of Adminiſtration; or by reaſon of the Omiſſion of *Vi & Armis*, or *Contra pacem*; or for miſtake

miſtake of the Chriſtian Name, or Surname of the Plaintiff or Defendant, Sum of Mony, Day, Month, or Year, being rightly named in any Record preceding; or in the ſame Record, whereunto the Defendant might have Demurred.

Nor for want of *Hoc paratus eſt verificare*, or *Hoc paratus eſt verificare per Recordum*; or for that there is no right *Viſne*, ſo the Cauſe were Tried by a Jury of the County or Place where the Action is laid; nor for not Alledging or Omiſſion of *Prout patet per Recordum.*

Nor ſhall any Judgment be Reverſed after Verdict, Confeſſion by *Cognovit Actionem*, or *Relicta Verificatione*; or for lack of *Miſericordia* or *Capiatur*; or by reaſon that a *Capiatur* is Entred for a *Miſericordia*, or a *Miſericordia* for a *Capiatur.*

Nor by reaſon that *Ideo Conceſſum eſt per Curiam* is Entred, for *Ideo Conſideratum eſt per Curiam.*

Nor for that Increaſe of Coſts, after a Verdict in any Action; or where a Nonſuit in *Replevin* is not Entred to be, *at the Requeſt* of the Party to whom the Judgment is given.

Nor by reaſon that the Coſts are not Entred to be *by Conſent* of the Plaintiff,

But that all ſuch Omiſſions, Miſtakes, and ſuch like as theſe, not being againſt the Right of the Matter of Suit; nor whereby the Iſſue or Trial are entred, may be Amended by the Judges of the Courts.

This Act ſhall not Extend to Appeals, Indictments, or Preſentments of *Treaſon*, *Felony*, or *Murder*; nor to Bills, Actions, &c. upon Penal Statutes, other than concerning Cuſtoms and Subſidies of Tonnage and Poundage.

And by the ſame Statute it is provided, That no Execution ſhall be ſtayed in the ſame Courts by Writ of *Error*, or *Superſedeas* after Verdict and Judgment in any Action Perſonal, whatſoever, till Security given, according to the Statute made in the Third Year of the Reign of King *James* the Firſt, *Chap.* 8. whereby it is Enacted,

That in Writs of *Errour* brought upon any Judgment after Verdict, in any Writ of *Dower*, or *Ejectione firmæ*, Execution is not to be ſtayed, unleſs the Plaintiff in the Writ of *Errour* become bound to the Plaintiff in the Action, as the Court ſhall Order, That if the Judgment be affirmed, or the Writ of *Errour* diſcontinued by default of the Plaintiff; or the Plaintiff be Nonſuit in the Writ of *Errour*, that they ſhall pay ſuch Coſts and Damages as the Court ſhall appoint: And the Court may Enquire, what Special Loſs the Plaintiff in the firſt Execution hath by this Delay; and this the Court muſt alſo give him by way of Increaſe of Damages.

This

This Act doth not Extend to Writs of *Errour* brought by Executors, nor Adminiſtrators, nor any Action Popular, nor other Action brought on a Penal Statute, Except Debt for not Setting out of *Tithes*; nor to any Indictment, Preſentment, Inquiſition, Information, or Appeal.

And here we may alſo Obſerve, as before, That neither of theſe two laſt cited Statutes extend to Aid any Perſon before, but after Verdict, and not upon Demurrer. Nor doth either of them help *Miſ-pleading*, or defects in *Indictments*, *Appeals*, *Informations*, *Inquiſitions*, or *Preſentments*, or any Actions or Suits upon Penal Statutes; except ſuch as relate to Cuſtoms and Subſidies of Tonnage and Poundage.

What Defects in Pleading, or otherwiſe, are aided by the ſaid Statutes, we ſhall give you ſome Examples of, as follows:

And, firſt, ſee *Paſch.* 23 *Car.* 1. *Rotulo* 51. in *B.R. Morefield* and *Webb*'s Caſe, Reported by *Aleyn*, fo. *Placito* Where, in a Writ of *Errour* upon a Judgment in the Palace Court at *Weſtminſter*, in an Action upon the Caſe, upon a Promiſe, and Verdict for the Plaintiff; it was moved for *Errour*, That the *Habeas Corpora Jur'* was not Returned Served, but only a Panel of the Juror's Names annexed to it; which Caſe is Aided by the Statute of 21 *Jac.* 1. *cap.* 13. of *Jeofails*, which helpeth, when there is not any Return upon the Writs of *Venire facias*, *Habeas*,

Habeas Corpora Jur', and *Distringas Jur'*; ſo as a Panel of the Names of the Jurors be Returned and annexed to the ſaid Writs.

Whereupon it was Objected;

(1) That the Statute of 21 *Jacobi* extends only to Writs, and not Precepts, which iſſue out of the Palace-Court.

(2) That the Palace-Court was Erected by Letters Patents 6 *Car.* 1. which was after the Statute.

But Reſolved,

1. That the Palace-Court is within the Intention of that Statute; for it provides Amendment in any Action, Suit, Plaint, Bill, or Demand.

And Juſtice *Jones* was angry, That *Rolls* queſtion'd, if this Statute did extend to the Grand Seſſions in *Wales*.

But agreed *per Cur.* That the Statute ſhall not extend to Inferiour Courts in theſe Points.

2. Reſolved, That it Extends to Courts, Erected after the Statute, and ſo not within the Equity thereof.

And ſee *Mich.* 13 *Car.* 2. in *B. R. Tubb* and *Walwyn*'s Caſe, *Keble Vol.* 1. *Pl.* 137. Tit. *Averment*, where the Plaintiff moved to ſtay Judgment in *Ejectment*, becauſe the Life of the Party (during whoſe Life the Defendant

dant hath a Leaſe) was not *Averred* (according to 10 *Ed.* 4. 18.) which by 21 *Jac.* 1. *cap.* 13. is to be Inquired of by the Sheriff, or other Officer, as the Court ſhall think fit. *Averment de vie.*

And by *Foſter*, the like Rule was made before the Statute, in the Lady *Morleys* Caſe, after Verdict, as here.

But ſee *Mich.* 21 *Car.* 2. *Lee* verſus *Edwards*, in *Modern Reports* fo. 14. where an Action upon the Caſe was brought upon two Promiſes: *Averment de Cure.*

And the *Firſt* was, *That in Conſideration the Plaintiff would beſtow his Labour and Pains about the Defendant's Daughter, and would Cure her, the Defendant did Promiſe to pay ſo much, and would alſo pay for the Medicaments.*

Secondly, In Conſideration the Plaintiff had Cured the Defendants Daughter, the Defendant did Promiſe to pay ſo much.

And to ſtay Judgment, it was Objected by *Raymond*, That the Plaintiff did not *Aver* in his Declaration, *That he had Cured the Defendants Daughter*, the Conſideration of the firſt Promiſe being Future; and both Promiſes found, and entire Damages given.

But *Twiſden* ſaid, It is well enough; for now it lies upon the whole Record, whether he hath Cured her, or not; but if it had reſted upon the *firſt Promiſe* only, it had been ill.

And in the *ſecond Promiſe*, there is an *Averment* of the Cure; ſo that now, after Verdict, it is helped; and the want of an *Averment* is helped by a *Verdict*, in many Caſes.

Licenſe Miſpleaded.

Vide Hil. 22 & 23 *Car.* 2. *Rotulo* 233. in *B. R. Hoskins* verſus *Robins*, in *Sander's Reports*, Part 2. fo. 32. where ſaid, That the Inſufficiency of Pleading a Licenſe, is helped by the Statute of *Jeofails*, after Verdict.

Iſſue Miſjoyned.

And ſee *Mich.* 24 *Car.* 2. in *B. R. Holman* againſt *Dodde*, *Keb.* Vol. 3. Tit. *Amendment*, *Pl.* 15. where the Plaintiff in Debt, upon an Obligation to perform Covenants in an Indenture, aſſigns Breach for Non-payment of Rent at *Michaelmaſs*, according to the Leaſe, but then, or 40 Days after, by the Bond.

To which the Defendant did Rejoyn, That he paid the ſame at *Michaelmaſs*; *Et de hoc ponit ſe ſuper Patriam*, *Et prædictus*, the Plaintiff *ſimiliter*.

After Verdict, it was Moved by *Staples* to ſtay Judgment, for that the Iſſue is Miſjoyned; and tho' it were *quod prædictus Robertus* (who was the Defendant) for *Rowlandus* (the Leſſee,) and the Directions to the Clerk were right; yet being no Iſſue, there was no Verdict, and ſo not Aided by the Statutes of 16 & 17 *Car.* 2. *cap.* 8.

And here its no Iſſue, That the Defendant did Perform, *Et de hoc ponit*, &c. *Et prædictus*, the Plaintiff *ſimiliter*.

For

For (as in 1 *Cro.* 317. *Pl.* 380.) its an Iſſue by the Rejoynder, *That* Robert *did not pay, &c.* therefore not Aided by the Statute; according to 2 *Cro.* 579. *Pl.* 9. in *Aldridge's* Caſe:) But the Rent being Reſerved only at *Michaelmaſs* by the Leaſe, tho' the Bond be at *Michaelmaſs*, or 40 days after, is well enough.

Vide Paſch. 26 *Car.* 2. in *C. B. Naylor* verſus *Sharpley, & al', Coronator' Com' Palatin' Lanc'*, in *Modern Reports* 188, 189. where one brings Debt againſt the Sheriff of that County, and Sues him to the Outlawry, and directs a *Capias* to the Chancellor, who makes a Precept to the Coroners of the ſame County, being Six, to take his Body, and have him before the Juſtices of the Common Pleas at *Weſtminſter* at ſuch a day: And one of the Coroners being in ſight of the Defendant, and having Opportunity enough to Arreſt him, doth it not; but they all Return——*Non eſt inventus*, tho' he might have been Taken every day.

Whereupon the Plaintiff brings his Action in *Middleſex* againſt all the Coroners, and has a Verdict for 100 *l.*

And to ſtay Judgment, Serjeant *Baldwyn* Objected, That the Action ought to have been brought in *Lancaſter.*

He agreed to the Caſes put in *Bulwer's* Caſe, in *Co. Lib.* 7. where the Cauſe of Action ariſeth equally in two Counties; but here, all that the Coroners do, ſubſiſts and determines in the County Palatine of *Lancaſter*; for they make a Return to the Chan-

Chancellor of the County Palatine only, who makes a Return to the Court.

He inſiſted upon *Huſſey* and *Gibb*'s Caſe, in *Dyer* 38. and further ſaid, That this Action is grounded upon two Wrongs; one, *The not Arreſting him when he was in ſight*; and the other, *For the Returning*, Non eſt inventus, *when he might have eaſily been taken.* Now, for the Wrong of one of them, they are all charged, and entire Damages given.

He Allow'd, That two Sheriffs make but one Officer; but ſaid, That every Coroner is reſponſible for himſelf only, and not for his Companion.

Serjeant *Turner* and *Pemberton*, *contra*; That the Action was well brought in *Middleſex*, becauſe the Plaintiff's Damage aroſe there, *by not having the Body here at the Day.*

They cited *Bulwer*'s Caſe, and *Dyer* 159*b.* and Agreed, That the *Chancellor* of the County Palatine Returns to the Court, the ſame Anſwer that the Coroners Return to him; ſo that their *Falſe Return* is the Cauſe of the Prejudice that accrues to the Plaintiff in this Action, the Ground whereof is the Return of *Non eſt inventus*; which is the Act of them all.

That one of them ſaw him, and might have Arreſted him, and that the Defendant was daily to be found, &c. are but mentioned as Arguments, to prove the *Falſe Return.*

And

And they Conceiv'd, That an Action would no more lye againſt one Coroner, than againſt one Sheriff in *London*, or any other Place, where there are two.

Then, as to the firſt Objection taken by *Baldwyn*, they ſaid, That admitting the Action to be laid in another County than where it ought; yet after Verdict it is Aided by the Statute of 16 & 17 *Car.* 2. if the *Venire* come from any place of the County where the Action is laid: It is not ſaid, in any place of the County where the *Cauſe of Action ariſeth.* Now, this Action is laid in *Middleſex*, and ſo the Trial by a *Middleſex* Jury is good, let the Cauſe of Action ariſe where it will.

Cur', That Statute doth not help your Caſe; for it is to be intended, when the Action is laid in the *proper County*, where it ought to be laid, which the words *Proper County* implies.

But they inclined to give Judgment for the Plaintiff, upon the Reaſons given by *Turner* and *Pemberton.*

And ſee *Keble*, Vol. 2. Pl. 8. Tit. *Eſcape*, *Hepping* againſt *Huneyard*, where, in an Action on the Caſe, for Reſcuing of one taken in Execution, after Verdict.

Stroud moved to ſtay Judgment, on *Hetley* 34. That no Action upon the Caſe will lye againſt the Sheriff, or by him: *Sed non allocatur*, for the Sheriff may be a Beggar; and therefore though the Plaintiff may have an Action upon the Caſe againſt him for

for the Eſcape, yet he may take the Priſoner again.

And as to its being ſaid, *That the Party being Arreſted by the Sheriff of* Devon, *at* Topſham, *the Defendant reſcued him at* Exeter; the Court agreed, the Eſcape to be the ſame all over *England*; but that it ought to have been ſhewed, how the Party came into *Exeter*: For this cannot be intended; nor (being the Subſtance of the Matter) is it Aided by the Statute of 16 & 17 *Car.* 2. *cap.* 8.

And *Idem Vol. eodem Pl.* 26. *Frain & Uxor* Adminiſtratrix of *Smalman* verſus *Painter*, where, in an Action of Debt for Rent, the Plaintiffs did declare, That the Inteſtate, out of his Term, made an Under-Leaſe to the Defendant, yielding and paying, &c. and that the Inteſtate died (ſuch a Day,) and Adminiſtration was committed to the Plaintiff's Wife.

To which the Defendant did plead, That the Inteſtate Aſſigned to *K.* to commence after his Death; *Abſque hoc*, That he died poſſeſſed of ſuch a Term, *prout*: And upon this *Traverſe* Iſſue was joyned, and Verdict for the Plaintiff.

And to ſtay Judgment, *Sanders* Objected:

(1) That the Action was in the *Debet* and *Detinet*; which cannot be by Adminiſtrators, as Plaintiffs.

(2) That

(2) That the Rent is reſerved Half-yearly, and there is a Year and Quarters Rent found due, which is impoſſible.

Jones pro Quer', The Right is Tried, and ſo the Declaring in the *Debet* and *Detinet*, when it ought to have been in the *Detinet* only, is Aided by the Statute of 16 & 17 *Car.* 2. *cap.* 8. of *Jeofails*, as in the Caſe of *Cumber* againſt *Walton*.

(3) The Expoſition of the Year and Quarter is well enough, the Time being one of the Terms upon which it was reſerved.

Cur', If it did not appear the Plaintiff were Adminiſtrator, as it doth, the *Debet* were of the Subſtance, and Aided by the Statute, which the Court agreed; and the Second Exception was miſtaken, otherwiſe it had been ill.

And *Idem Vol. eodem Pl.* 51. Tit. *Slander*, *Croft* againſt *Winter*; where an Action upon the Caſe was brought for words ſpoken in *London* of a Miniſter, *viz. He is a Thieviſh Rogue, and ſtole a Plate out of* Wadham-College *in* Oxon. And the Plaintiff having a Verdict in *London* to ſtay Judgment,

Sanders moved for the Defendant, That here was a *Miſ-Trial*, which ought to have been at *Oxford*; as in *Ford* and *Brook*'s Caſe, *Cro.* Part 3. 261. Miſ-Trial.

Jones

Jones contra, on the Statute of 16 & 17 *Car.*2.*cap.*8. this being Tried by a Jury in the *proper Place*, and the Juſtification ſhould have been in *London*, the Felony being Tranſitory and not Local; as *Robbery*, &c.

Jeofail. And the *Court* Agreed, this was a *Jeofail.*

Twiſden, The Felony is Local, whether it come in by way of Juſtification or Declaration; and as in the Caſe of *Throbwalke*, the Juſtification makes the Matter to ariſe there; as where a Conſtable, on an Action laid here in *London*, doth Juſtify in *Eſſex*, there the Trial muſt be in *Eſſex*.

Keeling Chief Juſtice, and the Court Agreed to it in the Caſe of a Conſtable: But in Caſe of a Sheriff, or Bailiff, its Aided by the Statute, eſpecially the words being confeſt to be ſpoken in *London*. And Judgment was Affirmed.

CHAP.

CHAP. VIII.

Of Intendment.

IN the next place we ſhall give an Account, more amply than before, *What Conſtruction the Law doth make of the Intention of the Parties, as to Contracts, and other Matters.*

And for this, firſt, ſee *Cro.* 1 Part 141. *Paynter* verſus *Paynter, Trin. 6 Car.* 1. in *B. R.* where, in an Action upon the Caſe *ſur Aſſumpſit*, the Plaintiff declared, That the Defendant Promiſed, if the Plaintiff, *ad ejus Inſtanciam*, would Marry his Daughter, he would pay unto him 20 *l.* and give to him 20 *French Crowns* towards a Wedding-Dinner.

And the Plaintiff ſaith in Fact, *That he Married the Defendants Daughter, and required him to pay the* 20 l. *which he had not paid.*

Upon *Non Aſſumpſit*, it being found for the Plaintiff, it was Moved, That the Declaration was not good; for the Promiſe is but Conditional, *viz. If the Plaintiff*, ad Inſtanciam Defendentis, *would Marry the Defendants Daughter*; and ſo he hath not Averred the Performance of the Condition.

But

But the Whole Court conceived upon this Agreement, To Marry the Daughter *ad Inſtanciam*, and he Marrying her; it ſhall be Intended, *ad Inſtanciam*, without Averment.

And ſee *Cro.* 1 *Part* 163. *Mich.* 7 *Car.* 1. in *B.R. Taverner* and *Skingles* Caſe; where the Plaintiff Declared in Debt upon an Obligation, with Condition to Perform the Award of *J.S.* and *J.D.* ſo that they made it before the 10*th* Day of *October* next, under their Hands and Seals: And if they do not Agree, then to ſtand to the Umpirage of *J.N.* ſo that he made it in Writing under his Hand and Seal, before the 28*th* of *October* following.

The Defendant pleaded, That *J.S.* and *J.D.* did make no Award before the 10*th* day of *October*.

The Plaintiff Replied, It is true, They did not; but *J.N.* did make the Umpirage and Award before the 28*th* day of *October*, (*inter alia*) the Defendant was to pay 30*l.* unto the Plaintiff upon ſuch a day, at ſuch a place: And for Non-payment, &c.

It was Moved, That the Submiſſion was void, and incertain; for it is,——*That if they do not Agree*; and it doth not appear to what they ſhould agree; *ſed non allocatur*, for the words, *If they do not Agree*, have the Intendment——*If they do not Agree, to make their Award under their Hands and Seals before ſuch a day.* For otherwiſe it is *quaſi* a Non-Agreement within the Condition.

(2) It

(2) It was Objected, That the *Award* was void, becauſe the Money was appointed to be paid at the Houſe of one *W. S.* a Stranger; *ſed non allocatur*; for the Appointment of the Payment of the Money at a Strangers Houſe (eſpecially as here, being a Common Inn) cannot be unreaſonable, nor an unlawful Act; for, by *Intendment*, the Plaintiff ſhall procure ſuch Kindneſs, that the Mony may be paid there; ſo the Award was Adjudged good *prima facie*, and the Plaintiff had Judgment.

And ſee *Style's Rep.* 465. *Wood* and *Gunſton's* Caſe, *Mich.* 1655. in *B. R.* where in an Action upon the Caſe, for Scandalous words ſpoken of the Plaintiff, *viz.* for calling him *Traytor*; the Iſſue was tried at the Bar, and the Jury found for the Plaintiff, and gave him 1500 *l.* Damages: And upon Suppoſition, that the Damages were Exceſſive, the Defendant moved for a *New Trial.*

It was ſaid, That after a Verdict, *Partiality* of the Jury ought not to be Objected or queſtioned, and therefore no *New Trial.*

Glyn Chief Juſtice: It is in the Diſcretion of the Court to grant a *New Trial*; but that muſt be a Judicial, and not an Arbitrary Diſcretion; and the Court may take notice of the Miſcarriages of Juries, and grant New Trials upon them: For a Jury may ſometimes, by Indirect Dealing, be moved to ſide with one Party, and not to be Indifferent between both Parties; but it cannot be ſo *Intended* of the Court. And a *New Trial* was Awarded.

And ſee *Co. Lib.* 5. 120. *Long*'s Caſe, where in an Indictment of *Murder*, Error was alledged, becauſe the Indictment was ſaid to be taken before *W. S. Coronatore Dominæ Reginæ infra Libertatem dictæ Dominæ Reginæ Villæ ſuæ de* Coſſam *prædict' per Viſum Corporis*; and it was not alledged to what Places the Liberty did Extend, nor what part, or any part of the Town of *Coſſam*, was within the Liberty: So as it doth not appear, that the Coroner had Juriſdiction; and it was ſaid, That Indictments which do concern Life, and which are the King's Counts, ought to have a plain and preciſe Certainty, to which the Party may anſwer, and ſhall not be taken by Argument.

But Reſolved by the Court, that the Indictment was good enough: For if an Indictment be Certain to a general Intent, the ſame is good enough: And in this Caſe the Indictment is certain enough to a general *Intendment*, becauſe *Coſſam* is within the Liberty of *Coſſam*; and that the Town it ſelf ſhall be *Intended* to be out of the Liberty of the Town, is a ſtrain'd Conſtruction, which the Law will never allow of.

And ſee *Co. Lib.* 4. 65. *Fulwood*'s Caſe, *Mich.* 33 *Eliz.* where *A.* being ſeiſed of a Houſe in *London*, acknowledges a Statute to the *Chamberlain* of *London*, for Orphanage-Mony, according to the Cuſtom; and afterwards acknowledges another Recognizance before the Recorder and Mayor, to B. who ſued

ſued Execution thereupon, and had a *Liberate*, but it was not Returned; and the Sheriffs, upon that, delivered the Houſe in Execution to *B.*

The Succeſſor of the Chamberlain ſued Execution upon his Recognizance, by *Elegit*, to the Serjeant at Mace.

Amongſt other Matters in this Caſe, it was Objected;

That here was no Recognizance in the nature of a Statute found; for the Jurors have found——*Quod* A. *veniebat coram Recordatore Civitatis* London, *&* T. O. *Majore Stapulæ, Et recognovit ſe debere* B. 200 l. and doth not ſay,——*Secundum formam Statuti, &c.* nor——*Per ſcriptum ſuum Obligatorium.*

Whereas the Statute of 32 *H.* 8. provides, that it ſhall be by Bill Obligatory, ſealed with three Seals. But it doth not appear by the Verdict, that it was according to the Statute, and although that Verdict, being the words of Lay-men, ſhall be taken according to their meaning, and there needs not ſo preciſe Form in them, as in Pleading; yet the Subſtance of the Matter ought to appear either by Expreſs words, or by words Equivalent; ſo as there ought to be a convenient Certainty, the which, if it be falſe, the Party for ſuch Falſity may have an Attaint.

But it was Reſolved, that the Verdict was good; for inaſmuch as they have found a Recognizance before the Mayor and Re-

corder, &c. It ſhall be in a Verdict of Laymen, *Intended* according to the Statute, for otherwiſe they cannot take any Record; and alſo the ſequel of the Verdict doth imply, That there was a Recognizance in the Nature of a Statute, otherwiſe no Execution could be ſued thereupon.

CHAP. IX.

Of Bills of Exception.

THen touching *Bills* of *Exception.*

This (as it ſeems by 27 *H.* 8. in *Tatam*'s Action upon the *Caſe*) is, when one of the Parties, for the *Inſufficiency* of the Evidence on the other ſide (as he conceives it) doth offer to *Demur* upon the ſame, and the *Court* thinking it to be *good*, or the other Party Refuſing the ſame, do not *Agree* to it; then the *Court* ought (upon Requeſt) to Seal to the Party, ſo *refuſing*, this *Exception* in a *Bill*, which upon a *Writ* of *Error* (as appears by *Fitzh. Nat. Brevium*) may be aſſigned for *Error*; whereupon, by the *Statute*, a *Writ* (if need be) is to be *Awarded* to thoſe Juſtices, to *acknowledge* or *deny* their Deed; but (as it ſeems) by the ſaid Book of 27 *H.* 8. need not, *de Rigore Juris*, be allowed in *Arreſt of Judgment.*

Stat. *Weſtm.* 2. cap. 31.

And

And it appears by *Fitz. Natura Brevium*, and 11 *H.* 4. *That this Bill must be Sealed before Judgment, and not after.*

For the Formal Drawing up of *Bills of Exception*, ſee one to the *Evidence* upon the Trial at the *Aſſizes*, in an Action of *Treſpaß, Aſſault*, and *Falſe Impriſonment*, brought by *Verdon* againſt *Decele, Heyward*, and others, in the *King*'s-*Bench*, *Hill.* 33 & 34 *Car.* 2. in *Brownl. Latine Redivivus*, Tit. *Bills des Exceptions*, and *ibid. Mich.* 32 *Car.* 2. where a *Writ of Error* was brought in the *King*'s-*Bench* at *Weſtminſter*, upon a *Bill of Exception*, to *Evidence* upon a Trial at the *Bar* of the *Common-Pleas* Court in *Ireland*, upon an *Ejectione firmæ*, with ſome others there, under the ſame Title.

CHAP. X.

Of Verdicts.

A *Verdict*, is the *Answer of a Jury, made upon any Cause committed by the Court to their Trial:* Which is twofold, *Special*, or *General.*

A *Special Verdict* is, when they say at large, *That they find such and such Matters to be done by the Tenant*, or *Defendant*, so declaring the Course of the Fact, as in their Opinions it is proved; and as to the Law upon the Fact, they pray the Advice of the Court thereupon.

And this *Special Verdict*, if it contain any ample Declaration of the Cause, from the beginning to the end, is also called a *Verdict at large.*

Whereof see divers Examples in *Stamford's Pleas of the Crown, Lib.* 3. *cap.* 9.

A *General Verdict* is that which the Jury find in General Terms, upon a General Issue;

As in an Action of *Disseisin*, the Defendant pleads, *No Wrong, No Disseisin*; then the Issue is General, whether the *Fact* be a Wrong, or not; which being put to the Jury, they weighing the Evidence, do either bring in their Verdict for the Plaintiff, That it is a *Wrong*, and *Disseisin*; or for the Defendant,

fendant, That it is *No Wrong*, *No Diſſeiſin*. *Vid. Co.* 1 *Inſt.* fo. 228. *a.* and *New Book of Entries*, Tit. *Verdict*.

First, As to a *Verdict*, it muſt be ſufficient in *Matter* and *Form*, be the ſame *Special* or *General*; as, if the Jury do not *Aſſeſs Coſts and Damages*, *where the ſame ought to be found*, and the like.

And therefore 21 *Ed.* 4. 11. where a *Tender* of *Homage* was found to be made, and not ſhewed in *what County*; the ſame was *ill*. *Quære* thereof, for it appeared in the Pleading, &c.

Damages; where to be found *Entire*, and where *Several*.

Next, where the *Damages* are to be found *entire* or *ſeveral*,

Touching which, ſee a good Caſe in 1 *Ed.* 5. 5. where the Plaintiff did Count in *Detinue of Damages* touching every part in *ſeveral*; and the Jury found for the Plaintiff to the Damage of Twenty Pounds *entirely*, if the Things could not be had; where, by the *Better Opinion*, the *Damages* ought to be found *ſeveral*, as the Declaration was.

See the ſame Caſe more at large in *Bro.* Tit. *Count*; and ſo is 3 *H.* 6. 43.

And by 9 *H.* 6. 66. in *Waſt*, the *Jury* ought to *ſever* the *Damages* for every *ſeveral Tree*, and every *ſeveral Parcel*; but in a Writ to *Enquire of Damages*, ſhall find none, becauſe *Confeſt*.

And 8 *H.* 4. 6. The *Jury* ſevered the Damages in a *Præmunire*, againſt the *Principal* and *Acceſſary*, as they ought to do.

And ſo 19 *H.*6.32. in *Forcible Entry*, where ſome found, to *Detain Forcibly*, and others, to *Enter Forcibly*.

And ſee alſo in the Title *Damages*, in *Brook*, 22 *H.* 6. 73. where *ſeveral Iſſues*, *ſeveral Damages*.

And ſee there afterwards, how *Damages* may be *ſevered*; and ſo it is better to be many times: But *Coſts*, according to 36 *H.*6. muſt be *entire*.

And 17 *Aſſ.* 22. in *Treſpaſs* againſt Two, where *one* was *found guilty* of part, and the *other* of other part, the Damages *ſevered*. And ſo is 22 *Aſſ.*76.

But 29 *Aſſ.* 33. if one Perſon be found guilty of *ſeveral Treſpaſſes*, the *Damages* may be aſſeſt *entirely*.

And ſee *Bro. Damages* 118. 5 *Ed.* 4. That if *one* of the Iſſues be a *Feofail*, and the Damages *entirely Aſſeſt*, 'tis both *ill*.

And 11 *H.*7. 19 & 20. in *Treſpaſs* againſt Two, of *two Horſes* taken *ſeverally*, Damages muſt be *ſeveral*: Otherwiſe, if one be charged with *ſeveral Treſpaſſes*.

See more hereof in the ſaid Title of *Damages*, in *Bro. Abridgment*.

Verdict ayd bon Pleading.

And, *Where a Verdict ſhall make ill Pleading good*, ſee before in the Title of *Pleading*, in that *Special Diviſion*.

As 21 *H.* 6. *Bro. Verdict* 91. where the *Demandant* intending to Counter-plead a *Reſceit* ſaid, That the Plaintiff *Riens avoit Jour del Brief*, and ſaid not, *Ne unque puis*, which was *ill*; yet, if it be found for the

the *Priee*, the Verdict hath made the Plea *good*; otherwiſe not. The like of *Non-tenure*.

But by *Brook*, The ſame after *Verdict* is helped by the Statute of *Jeofails*.

The like 22 *Ed.* 4. 46. *Que le Baron ne fuit ſeiſie que Dower jour del' Eſpouſals.*

The like 5 *H.* 7. 14. If an Executor plead, *Riens entermains Jour del Brief, &c.*

The like 6 *H.* 7. 6. 3 *H.* 7. 8. and 20 *H.* 6. 22.

Then, *Where the Verdict is contrary to other Matter of Record.* *Verdict contr' al' Matter de Record.*

As 11 *H.* 6. 42. *Bro.* 96. in a Writ of *Error*, the Death of one of the Parties to the Writ was alledged ſuch a Day, *Et alii è contra*; and the Death found accordingly; yet becauſe it appeared by the ſame Record, That the ſaid Party alledged to be dead, had appeared three Days after in Perſon at the *Niſi prius* in the firſt Action, therefore this *Verdict* was holden a *Jeofail*.

And 14 *Aſſ.* 9. the *Special Verdict* was found a *Record* for the Defendant; and the Plaintiff, to diſable the *Verdict*, ſhewed the Record to be otherwiſe, and *good*.

And 25 *Aſſ.* 2. The Defendant in an *Aſſize* did plead, *That he did Enfeoff the Plaintiff within Age, and after did Enter upon him.* To which the Plaintiff Replied, *That the Defendant was at Age the ſame time*, and ſo found accordingly; and the Party being in the *Court* in *Perſon*, was Adjudged by *Inſpection* within *Age*, and that ſtood, and the *Verdict* holden for none.

And

And ſo 9 *H.* 6. 37. If the Defendant in *Debt* Plead *Matter*, that proveth his *Deed*, and yet conclude *Non eſt factum*, and it be found accordingly; yet Judgment ſhall not be given upon the *Verdict*, but upon his own *Confeſſion*; *quod nota.*

And 3 & 4 *Mar. Dyer* 147. a *Verdict* could not find, That the Party himſelf was Eſtopped by Indenture.

Of *Special Verdicts.*

Then, touching *Special Verdicts*, there is a Statute, *viz. Weſtminſter* the 2*d*, which ſays, *Quod Juſtic' ad Aſſiſas non Compellerentur, &c.*

By Equity whereof, as it appears in the Parſon of *Homeland's Aſſize* of *Freſh-Force*, in *Plowden's Commentaries*, as well upon every Special Iſſue, as General, the Jury may give a *Special Verdict*; where the Iſſue in that Caſe was upon the Entry, *pendant le Brief.*

And ſo are divers other Books to that Intent; as 33 *H.* 6. 30, & 31. and 18 *Ed.* 4. 48. upon the Plea of *Non Detinet.*

And ſo 43 *Aſſ.* 1. upon the Iſſue *Frank*, & *de Frank Eſtate.*

And ſo 42 *Ed.* 3. *Bro.* 85. upon the Iſſue, *Ne unque ſeiſie que Dower*, or, *Ne dona pas.*

And ſo 41 *Ed.* 3. 10. where the *Reſceipt* was *Traverſed.*

And ſo 33 *H.* 6. where the Iſſue was, *If the Grantor of a Rent, had any thing at the Time of the Grant.*

And

And ſo 3 *H.* 6. 3. upon the Iſſue of *Aſſets entermains*, and *Aſſets per diſcent*. And ſo in every General Iſſue.

Yet 7 *H.* 4. 11. upon the Iſſue of *ſon Franktenement*, the *Court* would not ſuffer a *Special Verdict*.

But 1 & 2 *Mar. Dyer* 117. One did Traverſe a *Leaſe*, and the *Jury* found *ſpecially*, and *awarded* to Replead.

And ſo 11 *Eliz. Dyer* 284. in *Crowch* and *Butler*'s Caſe, where the Iſſue was by an *Abſque hoc*, and not a *General Iſſue*.

But 30 *Ed.* 3. *Fitzh. Abridgment* Tit. *Judgment*, in *Parco fracto* the Defendant ſaid, That the Plaintiff's Wife delivered the Beaſts out of the Pound, *Abſque hoc, que il infreint le Pound*; and the Jury found a *ſpecial Verdict*, That the *Headborough*, in the abſence of the *Baily* (according to Cuſtom) did deliver the ſame, and *good*; and the Defendant diſcharged, although the *Verdict* be Special, upon the Iſſue of *Abſque hoc*, becauſe there it is as a *General Iſſue*.

And ſo is 32 *H.* 8. in an *Aſſumpſit* to make Two things: The Defendant ſaid, That he did aſſume to make other Two things, *without that*, that he did aſſume in ſuch manner, &c. and found that he did aſſume to make one of the Things contained in the Declaration, and not the other, *and the Verdict*, for that laſt recited Reaſon, *good for the Plaintiff for that one Thing*. Otherwiſe, if an Iſſue be upon a Traverſe *Abſque hoc*, That *A.* and B. did Enfeoff.

And

And ſee in *Plowden*'s *Commentaries* in *Walſh*'s and *Sander*'s Caſe, That upon an Indictment of Felony a *Special Verdict* may be found.

And it appeareth alſo, *Mich.* 1 & 2 *Eliz. Dyer* 173. That in an *Attaint* a *Special Verdict* was received.

Of what things the Jury may take Cognizance.

Then ought to be known, *What things the Jury may take Conuzance of in their Verdicts*; as namely, *Matters in a Foreign County*, *Conditions*, *Records*, *Releaſes*, and the like.

Of Matters in a Foreign County.

And, firſt, touching *Matters* in a *Foreign County*, the Book of 22 *Ed.* 4. 19. is, That upon the General Iſſue in *Decies tantum*, the Jury may take Conuſance of Mony taken in another County: The like of *Aſſets*, but need not be thereunto enforced; *Qu. inde*, becauſe Tranſitory, and not like to Treſpaſs in Land; but may not Specially find the Taking in another County.

And ſo ſeems 1 *Aſſ.* 16. That they could not find the Death, or a Letter of Attorney expreſly in another County. *Quære tamen. Et vide Bro.* 24.

The like 7 *Ed.* 4. 15 & 16. of a *Reſignation* in another County, or a *Divorce*.

And 3 & 4 *Mar. Dyer* 132. the *Jury* found a *Leaſe* in *London*, and alledged as an *Exception*. And touching the Damage that ariſeth in another County by an Act they are bound to find; as *Battery* of the Plaintiffs *Servants* in *one County*, by reaſon whereof he loſt their Service in *another County*, although it be ſo declared.

And

And by 9 *H.* 6. 62. in Treſpaſs of *Battery*, or *Taking of Goods*, the *Jury* may find him *Guilty* in another Town in the ſame County: Otherwiſe of *Treſpaſs Local.*

But by 2 *Ed.* 3. 11. cannot Expreſly find a *Tender of Homage* in another County.

And it appeareth 7 *H.* 6. *Fitzh. Abridgment*, Tit. *Aſſize* 359. that the *Jury* may Specially find a Condition annexed to a *Feoffment*, according to *Littleton:* But otherwiſe to a *Releaſe*; but may not find a *Waranty*, becauſe that cannot be without Deed. And in a Writ of *Right*, the *Jury* may find a Releaſe of *Right*; but not a *Collateral Waranty.*

And ſo is 33 *Aſſ.* 11. touching a *Feoffment* upon Condition.

And ſo 28 *Aſſ.* 17. and 17 *Aſſ.* 20. of a *Confirmation* that doth Enlarge an *Eſtate*; otherwiſe not: But not a *Releaſe.*

16 *Aſſ.* 15. and 43 *Aſſ.* 41. A *Feoffment* given in Evidence, the *Jury* in reſpect of the *Livery* are bound to find; but may not take Conuſance of a *Releaſe.*

And by 21 *Aſſ.* 28. the Jury did find a *Feoffment* upon Condition, not given in Evidence.

Then, *How the Jury may find a Matter of Record.* How the Jury may find a Matter of Record.

See, firſt, 3 *H.* 7. and 2 *H.* 4. That if a *Jury* find an *Utlary*, or a Writ of *Non Moleſtando*, or another Matter of Record, the ſame is void.

Yet 28 *Aſſ.* 17. a *Verdict* found a *Recovery*, &c.

And

And 26 *Aſſ.* 5. *Verdict* found a Fine not pleaded, or given in Evidence *ſub pede ſigilli*, whereof is a *Mirum* made in the Caſe, by the Reporter: And ſo the like, the ſame Year, *Placito* 3. upon a *Recovery* found by *Verdict*.

And 26 *Aſſ.* 2. The *Verdict* in an Aſſize found an *Attainder*, and the Court there took it *ill*.

But touching this Learning ſee *Newſe*'s and *Scholaſtica*'s *Aſſize* in *Plowden*'s *Commentaries*; where 'tis ſaid, That a Note of a *Fine*, or a *Recovery*, without the Record it ſelf, *Sub pede ſigilli*, or the *Number-Roll*, may be given in Evidence, if the Jury will ſo accept of it: Otherwiſe of Pleading the ſame.

And ſo holden without doubt upon the ſame Book 26 *Aſſ.* and other Books, That the *Jury* may; and in ſome Caſes ought to find a Matter of Record, which ſeems, when given in Evidence, *Sub pede ſigilli*.

See more hereof in the Chap. of *General Iſſue*, and *Special Evidence*, *antea*.

Spiritual Matter, how to be found by the Jury.

Then, *How the Jury ſhall find a Spiritual Matter.*

Firſt, ſee 21 *H.* 3. 9. where a *Verdict* in an *Aſſize* found, That the Father of the Tenant had taken the Order of a *Deacon*, and after Married the Defendants Mother, &c.

And 8 *Aſſ.* 5. it was holden, That the Jury in an *Aſſize*, may find the Plaintiff or Defendant to be a *Baſtard*; but if it were Pleaded,

Pleaded, it ſhall be Tried by a *Certificate* from the Biſhop.

And 29 *Aſſ.* 2. A Verdict in an *Aſſize* found a *Divorce*; for that it is not a Matter of Record, but a Matter in *Fait*; *quod nota.*

Where the Jury find a *Special Matter*, and Conclude contrary.

Then, it appears in *Amy Townſends* Caſe, in *Plowden's Commentaries*, That if the Jury, or an Office, find a *Special Matter*, and Conclude contrary, the Court ſhall not in their Judgment reſpect the Concluſion, but the Special Matter found; *quod nota.*

And ſo is 28 *Aſſ.* 17.

But, as appears, 16 *Aſſ.* 15. if they find a Special Matter, and Conclude according to the Law, the Special Matter is waived.

And ſee 18 *Eliz. Dyer* 153. The Jury found, *Quod non Conceſſit prout Def. &c.* when it ſhould be the Plaintiff, and *Aſſigned* in *Error.*

Verdict varying from Iſſue; where good, and where ill.

Then, *In what Caſes the Verdict, varying from the Iſſue, ſhall be good, and where ill, and for whom the ſame doth find.*

For which ſee before in this Chapter of *Verdicts* in the Diviſion of *Special Verdict*, and in the Chapter of *Iſſues*, where they find Part, or another Day, and the like: And ſee the Titles *Count* or *Declaration*, and *Traverſe*; as alſo the Caſes enſuing, *viz.*

36 *H.* 6. 2. In the Caſe of *Nul tiel Record* pleaded, and a *Recognizance* upon Condition certified.

And

And 16 *Aſſ.* 19. it's holden, That upon the Iſſue, *Ne enfeoffa pas*, the Verdict may find a Conditional Feoffment.

And 30 *Ed.* 3. 5. the Defendant in Account did plead *Pleinment Accompt devant* A. & B. and the Verdict found, That he did Account before *B. tantum*; and a *good Verdict* for the Defendant; *quod nota.*

And 21 *Ed.* 4. 10. in *Entry*, upon the Statute of *Ric.* 2. the Verdict upon the General Iſſue found him guilty of *Entry* only into two parts of the ſame, and *good* accordingly.

And 10 *H.* 6. 13. in *Debt* againſt the *Heir*, who pleaded *Riens per Diſcent*; to which the Plaintiff Replied, *Aſſets* in *Dale*, and the Verdict found *Aſſets* in *S*; and a *good Verdict*, for the *Place* is not material.

And 1 *Aſſ.* 14. if one of the Defendants in an *Aſſize* be acquitted, yet the Plaintiff ſhall have Judgment againſt the other; and yet they Pleaded Joyntly to the Plaint, *Non Diſſeiſiverunt.*

See 2 *Ed.* 3. 49. *Brook*, Tit. *Verdict* 20. If Executors plead, *Plene adminiſtraverunt*, and it be found, That they did fully Adminiſter to Ten ſhillings, the Verdict doth paſs againſt them, and ſhall anſwer the whole Action. *Quære inde.*

And 7 *H.* 6. 33. the Iſſue was upon the Feoffment of *A.* and *B.* and the Verdict found, That *A.* did only Enfeoff; and, by the Better Opinion, found againſt him that doth plead the ſame. *Quære inde.*

And

And 40 *Ed.* 3. 35. If in Debt againſt Two, who plead *Non eſt factum*, it be found to be the Deed of one of them, and not of the other, yet the Plaintiff ſhall Recover.

And ſee 28 & 29 *H.* 8. *Dyer* 32. where one Declared in Debt upon a Leaſe of Twenty Acres: To which the Defendant pleaded, That the Plaintiff Lett the ſame Twenty Acres, and Four Acres over, *ſans ceo que il demiſe les* 20 *Acres tantum*; whereupon they were at Iſſue, and the *Verdict* found the Demiſe only of 21 Acres; and great Doubt was, for whom the *Verdict* was found, or whether for neither of them, and ſo a *Jeofail.*

And ſee *Dyer* 1 & 2 *Mar.* 115. in Debt upon an Obligation, the Breach of the Condition was aſſign'd in Cutting down Twenty Oaks, and Iſſue thereupon; *viz. Quod non ſuccidit prædictas viginti Quercus, nec earum aliquam:* And the Jury found, that he Cut Twelve, and the Plaintiff had Judgment.

And ſee 22 *Eliz. Dyer* 367. in an Information of *Uſury* the Defendant did plead; *Quod non habuit aut acceptavit prædictas Octoginta libras pro lucro, &c.* and the Jury found, *Quod acceptavit quadraginta libras*; *Et pro Reſid', Non Culpabilis*; which was there (among other things) aſſigned for Error, and nothing elſe taken notice of.

And ſee 47 *Ed.* 3. 19. One did pray to be Reſceived in Default of the Tenant for Life, and the Demandant ſaid, That the Tenant had *Riens*, *Priſt*, and ſo at Iſſue; and the Verdict found, That neither the *Tenant*, or the *Priee*, had any thing: Where holden, That it was found againſt the *Priee*; and the other Matter, *Que ils ne unque ount Riens*, not Material; *quod nota.*

And ſee 36 *H.* 6. 29 & 30. If a man in Pleading confeſs any thing contrary to his Form of Action, his Writ ſhall abate; but otherwiſe if the *Verdict* find the ſame.

Where the Jury find more than is in the Iſſue.

Then, *Where the Jury find more than their Iſſue.*

Vide 45 *Ed.* 3. 25. the Defendant in Treſpaſs of *Battery* did plead the General Iſſue, and the *Verdict* found the Defendant Guilty the day mentioned in the Declaration, and another day alſo, *ad dampnum decem librarum*; and *good*, for intended the *Aſſault* did continue.

And 26 *Aſſ.* 35. the *Verdict* did find, that the Plaintiff in the *Aſſize*, was ſeiſed and diſſeiſed, but no Diſſeiſor named, and the Writ did abate, although not pleaded.

But 39 *H.* 6. 13. in *Mordanceſtor* the Defendant did plead a *Bar*, which was found againſt him; and the Jury enquiring further of the Points of the Writ, did find againſt the Plaintiff; and yet Judgment given for him, becauſe there the Points of the Writ ought not to be enquired of.

And

And ſee 7 *H.*6.8,9,20. if the *Verdict* found the Iſſue, and more; as the Iſſue there being upon a *Diſcent*, do find the ſame, and a *Continual Claim*, that, as to the *Continual Claim*, is Surpluſage.

And ſo 39 *Ed.*3.38. the Plaintiff did Count in *Annuity* by Preſcription, which was Traverſed by the Defendant, and the *Verdict* found for the Plaintiff, and alſo *Riens arrear*, and Holden, as to that Surpluſage.

The like 13 *Aſſ.*4. in an *Aſſiſe of Rent* the Defendant made Default, and the Plaintiff, to aſcertain the Count made Title to a *Rent-Service*, and the Jury found a *Rent* by Preſcription, and yet the Plaintiff Recovered; *quod nota.*

And 13 *Aſſ.*2. in an *Aſſize* by *J. S.* Clerk; the Verdict found, That he was *Prebend, Nient noſm*; and the *Aſſize* did abate.

See more hereof in the Diviſion, immediately before the laſt Caſe.

And, *In ſome Caſes the Verdict found for the Plaintiff, and yet he ſhall be Barred.*

Verdict for the Plaintiff; yet he is Barred.

As 40 *Aſſ.* 6. in a *Mortdanceſtor* all the Points of the Writ found for the Plaintiff, and yet he was *Barred* for this Reaſon; for although he was Heir to his Father, yet becauſe his Elder Brother by the Half-Blood did *Enter*, he was *Barred.*

Where the Jury give divers Verdicts.

Then, *Where the Jury give divers Verdicts.*

As *Mich.* 3 & 4 *Eliz. Dyer* 204. To part they gave a Verdict at the Bar for the Plaintiff, and being Remanded to enquire of the reſt, came again and changed that Verdict, and with the reſt gave for the Defendant.

So in *Sander's Quid Juris clamat*, more ſtrongly, where the firſt was but a *Private Verdict*; *quod nota.*

Verdict muſt be by 12, except by Writ of *Inquiry.*

And know, *That every Verdict, unleſs by Writ to Inquire of Damages, ought to be by Twelve.*

And therefore 41 *Aſſ.* 1. a Verdict taken at the Aſſizes by Eleven, when the Twelfth would not agree, 'twas holden *ill*, and a new *Venire facias* awarded, and ſo the Original ſtood; *quod nota.*

Where ſaid, That the Juſtices ought to have carried them in Carts; and by other Authority, The Juſtices may Fine ſuch a Jury for their Obſtinacy, after Examination.

Verdict *de bene Eſſe.*

And Obſerve, That if a Protection be laid at the *Aſſizes*, and the Juſtices doubt, whether the ſame do lye, or not, they may take the Verdict *de bene Eſſe*; as 35 *H.* 6. 58. and other Books are.

Where the Verdict ſhall be void in part, or a *Jeofail.*

Then, *Where the Verdict ſhall be void in part, or in the whole; or where a* Repleader, *and a* Scire facias de novo.

See

See the Caſes before in this Chapter of *Verdict*, eſpecially in the Diviſion of *Special Verdict*; or where it doth vary, or is contrary to the Iſſue.

And ſee afterwards in *Miſdemeanour of the Jury*, and the ſame Caſe of 41 *Aſſ.* of the Verdict by *Eleven*; and 2 & 3 *Mar. Dyer* 132. a Doubt only moved, Whether a Verdict ſhall be void in the Whole, or not.

Miſdemeanour of the Jury, where it makes a *Verdict* ill.

And, Laſtly, *Where the Miſdemeanour of the Jury, or one of them, ſhall make the Verdict ill.*

See *Brook* in the Title of *Verdict*; as namely 20 *H.* 7. 3. where all of them did Eat before they did Commune of the Verdict, at their *own Coſts*, and the Verdict *good*; but if at the *Coſts* of the Party for whom they found, then *ill*; otherwiſe not.

Where its ſaid alſo, That in reſpect of *Neceſſity* or *Sickneſs*, one or more of them may Eat, or Drink.

And accordingly is 14 *H.* 7. 29. where the Jury, at the *Niſi prius*, by reaſon of a ſudden Tempeſt departing from the Bar, one of them entred into an Houſe, where he drank at the Requeſt of a Stranger; that told him, *The Earl of* Kent's *Part was better*; as well for that the Verdict was found againſt the Earl of *Kent*, as that the Matter was not ſhewed in time before Verdict; but it was Cauſe ſufficient to Fine the Juror.

The like of an *Eſcrowl* delivered to one of the Jurors, &c.

And accordingly is 24 *Ed.* 3. 24. the Juſtice at *Niſi prius* being informed, That the Sheriff had let the Jury go at large, to Eat and Drink, Refuſed the Verdict, Fined the Jury and the Sheriff, and awarded a New *Venire facias* for Trial of the Cauſe.

Yet ſee 14 *H.* 7. 1. where, in the *Common-Pleas*, the Jury found for the Plaintiff, and yet the Defendant had a New *Venire facias*; for that the Jurors, after their Charge, did Eat and Drink, and Diſallowed the firſt Verdict.

And it appears in *Welden* and *Elkington*'s Caſe, in *Plowden*'s *Commentaries*, That one of the *Jurors* was Fined, for having a Box of *Marmalade* about him; but the Verdict not avoided: But after a Privy Verdict, as is 2 *H.* 4. 21. and 5 *Ed.* 4. 6. 1. and at their own Expences, the *Jury* are ſuffered to Eat and Drink together, until, &c.

CHAP

CHAP. XI.

Of Judgments.

NExt in Order, *We ſhall Treat of Judgments.* Forms of Judgments.

And, Firſt, touching the Form of a *Judgment*, ſee 3 *H.* 4. 2. That whether the Plea be to the Writ, Count, or in Bar, and Judgment thereupon to be given for the Defendant, that the Words of the *Judgment* are all one, and ſhall be Expounded either Peremptory to other Actions; or otherwiſe, as the Matter of the ſaid Plea doth require.

As if one doth Demur upon the Count, the Judgment ſhall be, *Eo quod Inſufficiens eſt in Lege Quer' nichil Capiat per Breve:* Or Generally, *Nichil Capiat per Breve (ſive Billam,) Et quod Defend' Eat ſine die*; and ſhall, as before, in another Action be Peremptory, or not, as the Caſe of the firſt Plea requireth.

And 3 *H.* 4. 11. In Debt in *London*, the Defendant pleaded a *Foreign Plea*, and *Judgment* was given for the Plaintiff, *Quod Quer' ſequatur ad Communem Legem, Et quod Def. eat ſine die*; and there, in a New Action doubted, whether this Judgment might be pleaded in Bar.

And 3 *H.* 4. 18. in that Caſe the *Judgment* is recited to be, *Quod Quer' nichil Capiat per Breve, Et quod Def. Eat ſine die; quod nota.*

What Day Judgment ſhall be given.

In the next place, *What Day Judgment ſhall be given.*

For which ſee 9 *Aſſ.* 11. That it ſhall not be given until the *Fourth Day*; and if a Writ of *Attaint* bears Date before the ſaid *Fourth Day*, it ſhall abate.

Where, *i.e.* in what Court Judgment ſhall be given.

Then, *Where Judgment ſhall be given.*

For which ſee 21 *H.* 7. 35. where its ſaid, That if an Office Traverſed in the *Chancery*, be ſent into the *Common-Pleas* to be Tried, the Judgment ſhall be given there, becauſe the one Court and the other is *coram Rege.*

And 6 *Aſſ.* 4. 16. That if an Aſſize upon a *Foreign Releaſe* pleaded, be Adjourned to be Tried *in Banco*, and found for the Plaintiff; if he will Releaſe his Damage, he may have Judgment there: Otherwiſe, it ſhall be Remanded to Inquire of Damages.

Cauſes to *ſtay Judgment.*

Then ſhall be ſhewn, *What be Cauſes to ſtay Judgment.*

As 11 *H.* 4. 10. and 19 *H.* 6. 10. If the Court think the Damages given to be too great (as the Caſes were there in *Treſpaſs* and *Replevin*) the Court may *ſtay Judgment*, until the Plaintiff have Releaſed part of the Damages.

And

And ſo 11 *H.*4.17. where, after Verdict, it did appear by Examination, that one of the Parties had delivered an *Eſcrowl* to the Jurors.

And ſo 11 *H.*4.71. If it appear by Matter of Record, That the Land is in the King's Hands.

And 39 *Ed.* 3. 35. The Court upon Diſcretion did *ſtay Judgment*, becauſe it was ſuppoſed the Action to be brought by Covin.

Then, *Where Judgment ſhall be Final.* Judgment final.

It appears 26 *H.*8.8. That before the Miſe is joyned in a Writ of *Right*, or where the Tenant in that Action Voucheth, no *Judgment* ſhall be final againſt the Vouchee.

Yet ſee 44 *Ed.*3. Bro. *Judgment* 45. A *Feme Covert* was Received, and did Joyn the Miſe, and Judgment final given againſt her; yet thereof, and of an Infant, left doubtful, 9 *Ed.*4.16.

See *Fitzh. Nat. Brevium*, in his Writ of *Right*.

Then, *Where the Plaintiff may have Judgment for part, and Relinquiſh for the reſt.* Where the Plaintiff may have Judgment for part, and relinquiſh the reſt.

For which ſee, firſt, 16 *H.*7.17. where the Plaintiff in Debt did Count part upon a Leaſe of Land in *London*, and part of other Land: As to the firſt, they were at Iſſue in *London*; and to the reſt, at Iſſue alſo to be Tried in a Foreign County; and the firſt Iſſue found for the Plaintiff *ad dampnum* xx *d.* and Coſts xx *s.* and the Plaintiff did

did Relinquiſh the other Iſſue, and prayed *Judgment* for that, and had it.

And in the like Caſe 32 *H.*6. 4. the Plaintiff demanded Judgment of that Debt found, and Damages, and Relinquiſhed his Coſts until the other Verdict found.

And ſo ſeems 3 *H.*6. 37. and 42 *Ed.* 3. 25. In Debt, part upon an Obligation, and part upon a Contract: As to the *Obligation* the Defendant did Confeſs, and to the other the Plaintiff was Nonſuit, and yet had Judgment for the other.

And 50 *Ed.* 3. 11. in *Treſpaſs* againſt Two, if the one of them be Attainted before the other appears, the Plaintiff ſhall not have Judgment againſt him before the other appear and Plead alſo; except he will Releaſe againſt the other.

And ſo 45 *Ed.* 3. 3. Where one of the Defendants in *Treſpaſs* doth make default.

And 36 *H.*6. 13. the Defendant in Debt, as to Parcel pleaded *tout Temps priſt*, and to the reſt *Nil debet*; where its ſaid, That the Plaintiff may have Judgment of the Parcel confeſt *Maintenant*, and of the Damages, for the Court may Tax the ſame; but *Ceſſet Executio quouſque*, becauſe of the Coſts.

But 22 *H.* 6. 48. if in Debt the Defendant plead to the Iſſue for Part, and a *Nil dicit* to the Reſidue; as to the ſame the Plaintiff ſhall have Judgment preſently; but as to the Damages, he ſhall ſtay until the other Iſſue be Tried, although it be in Caſes where Damages ought to be ſevered.

But

But ſee 5 *Ed.* 4. 108. where in *Treſpaſs* againſt *Baron* and *Feme*, the *Baron* did plead *Non Culpabilis*, and the *Feme* a *Foreign Plea*; whereupon Iſſue was taken, that was a *Jeofail*; the Plaintiff cannot relinquiſh the ſame, and *Pray Judgment* againſt the Huſband, becauſe the Damages are not to be ſevered; but the Husband ſhall have advantage or diſadvantage of the Verdict of his Wife, if the Iſſue were good.

So if Two other perſons in *Treſpaſs* plead ſeverally, and the one of the Verdicts a *Jeofail*, becauſe of the Entirety of the Damages: Otherwiſe, if the Defendants were ſevered in the Proceſs, Pleading, or Demurrer.

And in *Treſpaſs* againſt Two, who plead *Non Culp'*, the Plaintiff cannot ſever his Judgment, but his Execution; and he muſt have Judgment before the Releaſe.

And 5 *Ed.* 4. 124. it appears, That if divers Pleas be pleaded, and one of them goeth to the Whole, the Plaintiff may Releaſe that for doubt of the Sequel.

And ſee 15 *Ed.* 4. 25 & 26. That if in *Treſpaſs* againſt Three, one maketh default, and the other pleadeth a Plea that goeth to the Whole, the Plaintiff may pray his Judgment againſt him that made Default, and Relinquiſh againſt the other.

Then

Two Judgments in one Action.

Then, *Of Two Judgments in one Action.*

As 36 *H.*6. 2 *&* 3. by *Priſot*, in Raviſhment of a Ward, the Judgment ſhall be of *Damages with the Body*; and if the Sheriff Return, *That the Heir is married*, the Plaintiff ſhall have a *Scire facias* for the greater Damages; and upon that he ſhall have another *Judgment* and *Execucion.*

The like by him in *Detinue*, and alſo in *Debt* againſt Executors; where in the one Caſe, if the Sheriff Return, *That they are loſt*, and in the other a *Devaſtavit*, the Plaintiff ſhall have a New *Scire facias*, and have Judgment *de bonis propriis. Quære*, For, according to *Littleton*, the firſt Judgment ſhall be Conditional, *viz. De recover les biens ou Gard, &c. Et ſi, &c.*

And ſo is 22 *H.*6. 41. in *Detinue*, according to *Littleton.*

Where Judgment ſhall be with *Ceſſet Executio.*

And, *Where the Plaintiff ſhall have Judgment, but Execution ſhall ceaſe.*

See 24 *Ed.*3. 61. in *Dower*, of *Rent* granted to Ceaſe during the Nonage of the Heir. Alſo in *Perkins*; and there likewiſe, where *Dower* is brought, and a Term in being before the Marriage.

And ſee 15 *Ed.*4. 11. *&* 3. or 4 *Ed.* 3. 42. in *Treſpaſs* againſt Three, they all plead *Non Culp'* as to part; and *quoad reſid'* plead a *Gift* of the Goods, and *Iſſue* thereupon; and at the *Niſi prius* two make Default, and a third pleads a *Concord*, *puis darrein Continuance*, and prayed the *Iſſue* might be Tried againſt the two by Default; for that no Conti-

Continuance can be made of it, they being abſent; and if not Tried now, 'twill be Diſcontinued.

Objected, That goes but to Part, and there is now a Plea which goes to the Whole, which is to be Tried firſt: For if that be againſt the Plaintiff, tho' he ſhould have *Verdict* on the other, he can have no Judgment.

But for the Inconveniency, and for that this Plea to the Whole comes after the *Venire facias*, and the other was before, therefore 'twas Tried; but if both had been before the *Venire facias*, it could not have been; and 'twas found for the Plaintiff, and Judgment was had with a *Ceſſet Executio* till the other was Tried; for the *Concord* was laid in another County. So the Plaintiff Releaſed to him, and took Execution, tho' the Judgment was on the firſt Plea.

CHAP.

CHAP. XII.

Of Executions.

Execution, what.

EXecution is the laſt Performance of an Act, as of a Judgment in a Suit, *viz.* Where Judgment is given in any Action, That the Plaintiff ſhall Recover the Land, Debt, or Damages, as the Caſe is; and where a Writ is awarded to put him in Poſſeſſion, or to do ſome other thing whereby the Plaintiff may be the better ſatisfied his Debt or Damages, that is called a Writ of *Execution*; and when he hath the Poſſeſſion of the Land he ſues for, or is paid off his Debt or Damages, or hath the Body of the Defendant awarded to Priſon, then he hath *Execution.*

And where the Plea is in an Inferiour Court, as *County-Court*, *Hundred-Court*, or *Court-Baron*, and they defer *Execution* in favour of either Party, or other Cauſe, then the Party may have a Writ *de Executione Judicii.*

Vide Co. Lib. 6. fol. 87. *a.* Where is ſaid to be two ſorts of *Executions*, the one *final*, the other with a *quouſque*, tending to an End.

An *Execution final*, is that which makes Mony of the Defendant's Goods, or Extends his Lands, and delivers them to the Plaintiff, which he accepts in Satisfaction, and is the End of the Suit, and all that the King's Writ Commands to be done.

The

The other *Execution*, with a *Quousque*, is tending to an End, but not *final*; as in the Case of a *Capias ad Satisfaciendum, &c.* which is not final, but the Body of the Party is to be taken, to the intent to satisfie the Plaintiff; and his Imprisonment is not absolute, but until the same be performed.

And by *Co. Lib.* 8. 141. the Method of obtaining these *Executions*, are by certain *Judicial Writs*, some of which are against the *Person*, some of them against the *Goods* and *Chattels*, some of them against the *Lands*, and some against the *Body*, *Goods*, and *Lands*.

And by *Co. ubi supra*, The *Execution* for *Debt*, is Fourfold:

1. Of *Goods* only, by *Fieri facias*.
2. Of the *Moiety* of Lands, by *Elegit*.
3. Upon a *Statute*, or *Recognizance*.
4. Of the *Body*, by *Capias ad Satisfaciendum*.

Then, *Touching Executions upon Judgments by Writs of* Capias ad Satisfaciendum. Against whom Execution by *Capias* will lye.

First, Shall be declared against what Person an Execution will lye by *Capias*.

As namely, 26 *H.* 8. 7. Not against an *Abbot*; but upon a *Testatum*, the Plaintiff may have an *Elegit* into another County: Otherwise of a *Knight*; the like as an *Abbot*, of a *Bishop*, *Duke*, *&c.* if it be not upon a *Rescous*, or other Contempt, as 11 *H.* 4. 15. and other Books are.

And

And by *Co. Lib.* 8. 141. & *Lib.* 5. 88. & *Lib.* 6. 53. & *Lib.* 3. 12. *Magna Charta* 2. 18. *Weſtm.* 2. 11. This Writ of *Execution* may not be had againſt a *Duke*, *Earl*, or *Baron*, or their *Wives*, but in ſome Special Caſes; nor againſt an *Heir*, or an *Executor*, but in ſome eſpecial Caſes.

In what Caſes Execution may be had by *Capias*.

Then, *In what Actions, and other Caſes, Execution may be had by* Capias.

See, firſt, 34 *H.* 6. and 48 *Ed.* 3. *Bro.* 12. That in *Scire facias* upon a Recognizance, no *Capias*.

Yet 7 *H.* 4. 34. granted for the *King* in a Recognizance for the *Peace*.

Nor againſt *Executors*, in whoſe hands *Aſſets* were found, if not (as it ſeems) upon a *Devaſtavit* Return'd.

See more touching *Executions* againſt *Executors* in that ſpecial Title *Devaſtavit*, in *Brook*'s *Abridgment*.

And in 42 *Ed.* 3. 11. if one Recover in an *Action upon the Caſe* againſt an *Hoſtler*, becauſe he is not charged upon a *Wrong*, but a *Laches*, no Execution lieth by *Capias*.

The like in an Action upon the Statute of *Hue* and *Cry*.

And ſo is 42 *Aſſ.* 17. in the Caſe of an *Hoſtler*, although there was a *Capias* in the *Mean Proceſs*.

But 2 *H.* 4. 6. and *Roll. Abridg.* 898. one in *Dower* did Recover Damages, and could not have Execution of them by *Capias*, becauſe no *Capias* in the *Mean Proceſs*.

And ſo 11 *H.* 7. 15. in an *Aſſize*.

And

And 7 *H.* 6. 45. No *Execution* by *Capias* againſt one not Party to the Writ; as there, where, upon Iſſue in *Detinue* found againſt the Garniſhee, the Plaintiff recovered the Thing againſt the Defendant, and Damages againſt the Garniſhee, and could not have Execution of the Damages by *Capias*.

And Note this Difference, 40 *Edw.* 3. 25. That in Detinue of a Bag or Box of Writings, *Execution* lieth by *Capias*: Otherwiſe if there be one or more Writings in Certain; *quod Nota.*

Vide Pluis in Bro. Tit. Capias and Proceſs, Court Baron, Antient Demeaſn, Statute Merchant, *&c.*

And yet as appears, 11 *H.* 7. 15. In an Aſſiſe, where no *Execution* by *Capias* lieth againſt the Party for the Damages, yet if the Diſſeiſin be found to have been with force, and the Party to be taken by *Capias pro Fine*, (either within or after the year, as the ſaid Book is) he ſhall remain in *Execution* for the Party, *Quod Nota, Et quære inde.* *Execution by Capias pro Fine.*

And ſo is 7 *H.* 4. 39, *&* 40. Not mentioning whether the *Capias* were within the year or after; for in all other Caſes the difference is taken, where the Defendant is taken within the year upon the *Capias pro Fine*, and where after:

For in *Fitz. Nat. Br.* 121. In the one Caſe he ſhall remain in *Execution* without the Plaintiffs Requeſt, and in the other not, altho' he do requeſt the ſame.

And by *Co. Lib.* 8. 141. *&* *Lib.* 5. 88. *&* *Lib.* 6. 53. *&* *Lib.* 3. 12. *Magna Charta* 2. 18. *Weſtm.* 2. 11. This Writ of *Execution* may not be had againſt a *Duke*, *Earl*, or *Baron*, or their *Wives*, but in ſome Special Caſes; nor againſt an *Heir*, or an *Executor*, but in ſome eſpecial Caſes.

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And ſo is 7 *H.* 4. 39, & 40. Not mentioning whether the *Capias* were within the year or after; for in all other Caſes the difference is taken, where the Defendant is taken within the year upon the *Capias pro Fine*, and where after:

For in *Fitz. Nat. Br.* 121. In the one Caſe he ſhall remain in *Execution* without the Plaintiffs Requeſt, and in the other not, altho' he do requeſt the ſame.

And 7 *H.* 6. 5. Somewhat doubtful, if the Plaintiff requeſt not the ſame.

But 7 *H.* 4. 4. is clear without requeſt of the Plaintiff, becauſe the words of the Writ are, *Ad Reſpondend' tam Nobis quam Parti.*

And ſee 14 *H.* 7. 15. and 15 *H.* 7. 5. In an Aſſiſe, where the Diſſeiſin was found with Force, and the Record removed, and the Defendant taken *pro Fine Regis* within the year; yet could not remain in *Execution* at the requeſt of the Party, becauſe there he could not have *Execution* without *Scire Facias.*

And ſo is 1 *H.* 7. 20. When it is after the Year, or in the time of another King.

But as appears 11 *Ed.* 4. 67. This is no *Execution* for the Party, but at his Election; for altho', as the Caſe was there, he was diſcharged by conſent of the Plaintiff upon Recognizance given; yet the Plaintiff had at his Pleaſure a new Execution.

Eſcape. And ſo is 4 *Edw.* 4. 16. But more doubted, whether there the Gaoler may let him go at large by the Commandment of the King, and it ſeems there that he cannot.

And 22 *Aſſ.* 74. One taken *pro Fine Regis* upon a Diſſeiſin, found Pledges *pro Fine*, and there ſaid, That he ſhould not go at large, if the Plaintiff requeſt him to be in Execution; *quod nota.*

And ſee the Book of 14 *H.* 7. 28. That after a *Fieri Facias* awarded, and not returned, the Defendant was taken within the year upon the *Capias pro Fine*, and at the requeſt of the Plaintiff could not be detained for

for his Execution, but found Pledges for the *Fine*, and went at large: Otherwiſe if the *Scire Facias* had been returned *Nichil*; *quod nota.*

Vide Rolls Abridgment, fol. 901. Where ſaid, That if one be condemned for a Fine to the King, and Damages to the Party, in an Action where a *Capias* lies in the *Original*, and he is taken by *Capias pro Fine* at the ſuit of the King, and after ſuffered to eſcape, the Party Plaintiff may have Execution by *Fieri Facias* or *Elegit*, or he may ſue the Sheriff for an Eſcape.

Vide March's Reports, Caſe 86. Where one is impriſoned for the Kings Fine, and upon an *Habeas Corpus* it is returned, That he is in Execution alſo for the Damages of the Party, it ſhall be intended at the Prayer of the Party.

But by 13 *H.* 7. 6. If one be taken by *Capias pro Fine*, in ſuch a Caſe wherein he ſhall be ſaid to be in Execution for the Plaintiff alſo, and he do after ſue Execution againſt the Defendant by *Fieri Facias*, or *Elegit*; in that Caſe the Defendants Body is diſcharged from Execution as to the Plaintiff.

Vide Mores Reports, Caſe 172, and *Leonards Reports*, Firſt Part, 51. Where *G.* recovers in Debt in the *Common Pleas*, and upon Error the Judgment was affirmed, and he had Proceſs of Outlawry, and the Party was taken upon the *Capias Utlagatum*, within the year after the Judgment, upon Proceſs continued, without Diſcontinuance againſt him: And it was held that he ſhould be in Execution without any Prayer for it, *Capias Utlagatum.*

and without *Scire Facias*, becauſe the Proceſs was continued; and tho' the Original Judgment were in another Court, and that after the year he might have a *Scire Facias*.

But if one be taken at the Suit of the King *pro Fine Regis*, after the year upon Proceſs continued, he ſhall be in Execution for the King, but not without Prayer.

But if the Defendant be taken *pro Fine Regis* in a Suit wherein no *Capias* lies, nor *Capias ad Satisfaciendum* will lie for the Party; yet in that Caſe upon the Prayer of the Party Plaintiff, he ſhall be in Execution for him, but not without Prayer.

And ſee *Dyer*, fol. 306. Where ſaid, That in all Caſes generally where the Plaintiff may have a *Capias ad ſatisfaciendum* in the Suit, and the Defendant is taken by a *Capias pro Fine*, or a *Capias Utlagatum* after Judgment, there the Defendant ſhall be in Execution preſently at the Suit of the Party alſo, without any Prayer or Motion to the Court: And in Caſe where he may have a *Fieri Facias*, and no *Capias ad ſatisfaciendum*, as in Aſſiſe, Redifſeiſin, or the like, and the Party is taken by a *Capias pro Fine*, and Committed to Priſon at the Kings Suit; In all theſe Caſes upon a Prayer, and Moving the Court, the Defendant ſhall be in Execution for the Party alſo, but not without Prayer; and in Caſe where the Plaintiff hath a Judgment, and doth ſurceaſe his time, ſo that now he cannot have Execution by *Capias ad ſatisfaciendum*, or *Fieri Facias* without a *Scire Facias*: In theſe Caſes, if

if the Defendant, after this, happen to be taken by a *Capias pro Fine* for the King, or by a *Capias Utlagatum* after Judgment, he ſhall not be in Execution for the Plaintiff without Prayer, or Moving the Court.

In the next place ſhall be ſhewn, *Where Execution ſhall be had by Capias, Fieri Facias or Elegit.*

And, firſt, you ought to know, That upon Judgments by Courſe of the Common Law, were only *Fieri Fac'* and *Capias*, as namely in *Treſpaſs* or *Indictments*; where *Proceſs* of *Outlawry*, *Fieri Fac'* or *Capias* at the Election of the Plaintiff; and where no *Proceſs* of *Outlawry*, only *Fieri. Facias*; until firſt Remedy was given by the Statute of *Weſtm'* 2. *cap.* 19. which is, If a man recover Debt or Damages, it ſhall be at his Election to have a *Fieri Facias de Terris & Catallis*, or the Sheriff ſhall deliver to him *omnia Bona & Catalla* (*Debitoris*) *Exceptis Bobus & Affris Carucæ, quouſq; Debitum fuit levat' per Rationabil' Precium & Extent'*, and if he be *Ouſted*, he ſhall have *Aſſiſe* and *Redisſeiſin*. Where *Execution* by *Capias*, *Fi. Fa.* or *Elegit.*

And after in the ſame Statute, *Cap.* 47. *De hijs quæ Recordat' ſunt* like *Execution* given upon *Recognizances*; upon which have been divers Caſes in the Law of great Learning put ſince that time, as namely 50 *Edw.* 3. 4. In *Decies tantum* the *Elegit* was Returned *Nichil*, and afterwards the Defendant was taken by *Capias pro Fine*, and by the better Opinion could not ſtay in the *Execution* for the Party.

And by 5 *Edw.* 4. 41. 19 *H.* 6. & 30 *Ed.* 3. *in Bro.* 93. After an *Elegit* awarded and returned *Nichil*, no *Execution* by *Capias*.

And ſee 13 *Eliz.* *Dyer* 299. That after an *Elegit* the Plaintiff could not have Debt.

But as 21 *H.* 7. 19. after one *Elegit* returned *Nichil*, the Plaintiff may have another.

But by all the Books, if the Writ of *Elegit* had not been returned at all, then the Plaintiff might have a New *Execution* by *Fieri Facias* or *Capias*, as appears by 17 *Ed.* 4. 4. where before the return of the *Elegit* the year did Elapſe, and after the Plaintiff had a *Scire Facias* and a *Capias*.

And 42 *Edw.* 3. 11. after divers Writs of *Fieri Facias* upon Continuance, one was returned *Nichil*, and the Plaintiff had ſeveral *Elegits* in divers Counties.

And by 45 *Ed.* 3. 19. after a *Fieri Facias* returned *Nichil*, a *Capias* was awarded.

And 10 *Ed.* 4. 3. after Execution by *Fieri Facias* of part, the Plaintiff had a *Capias* for the Reſt; and ſo is 18 *Ed.* 4. 12.

But by 22 *Aſſ.* 43. the Body being in Execution, no further Execution ſhall be by *Elegit* or *Fieri Facias*.

And by 15 *H.* 7. 14, & 15. after a *Capias* one ſhall not have an *Elegit*, no more than a *Capias* after an *Elegit*.

So that hereupon, and by *Fitzh. Nat. Brevium* it appears, That after a *Fieri Facias* executed in part, or not executed, the Plaintiff ſhall have either *Capias* or *Elegit*; but if he betake himſelf either to *Capias* or *Elegit*, and

and thoſe Writs be returned, he muſt ſtill keep to the ſame, and to no other Execution; *quod nota.*

See more of this in *Brook Title Elegit.*

See alſo *Dyer* 4 & 5. *Mariæ* 162. How the Plaintiff Recovering 40*l.* againſt one that hath Land in divers Counties, may, dividing his Debt, or intirely, have ſeveral *Elegits.*

But by *Hobart* 58. There may not be two ſeveral ſorts of Executions out an once, but one after another.

Yet *Idem* fo. 2. If one *Elegit* be ſued out, and entred of Record, tho' the Plaintiff get nothing by it, yet he ſhall never have other Execution till ſomething be found, and no man will Record the Execution till he find ſomewhat.

Vide Yelvertons Reports, fo. 52, 53. Where ſaid, That if a man be taken upon a wrong Writ of Execution, tho' it be returned Executed, yet becauſe he in Truth never was in Execution, a new *Capias* may iſſue out againſt him.

And *Idem* 180. Where Goods are taken in Execution in another County, upon a *Teſtatum* returned, That the Defendant *Nulla habet Bona, &c.* in *London*, where the Action was Tried, but in the County of *B.* where the Goods were taken, which is falſe, the Execution ſhall be avoided, and the Party reſtored to his Goods again.

But by *Moor*, Caſe 428. though the Court grant an Erroneous Execution, yet that will not excuſe the Sheriff where there is an Eſcape.

Yet by *Hetley*, *Rep.* 157. Where the Sheriff upon a *Fieri Facias* takes a part of the Defendants Goods in Execution, and delivers them to the Plaintiff, and they be taken from him, he ſhall have Execution *de novo*.

And by *Popham* in his Reports, *fo.* 206. one may be diſcharged out of Execution by word only, as where one is in Execution at my Suit, and I bid the Sheriff let him go, this is a good diſcharge.

Upon Eſcape, Sheriff chargable in Debt or Caſe.

Vide Dyer, 306. Where ſaid, That in all Caſes, where the Law doth once adjudge a Defendant to be in Execution at the Suit of the Plaintiff, if the Sheriff ſuffer him to eſcape, he ſhall be chargeable to the Plaintiff for the ſame in an Action of Debt, or upon the Caſe:

Freſh Purſuit.

Yet by *Popham* 41. if he be taken in a Freſh Purſuit, tho' in another County, by that he ſhall be in Execution again.

And by *Co. lib.* 3. 71. where the Sheriffs of *London* at the going out of their Office, by Indenture did deliver *B.* in Execution to the New Sheriffs; and he being in Execution at the Suit of *C.* and *D.* did make his Eſcape. *D.* only is named, *C.* ſues the Eſcape, and had Judgment; and held that *B.* was not in Execution of the Old or new Sheriffs, and, *that the Old are to give notice to the New Sheriffs of them in Execution, tho' they be upon Record*;

Old Sheriffs muſt give notice to the New of thoſe in Execution.

Record; and the Priſoners are in Cuſtody of the Old Sheriffs, tho' out of Office, till delivered to New; and if the Old Sheriffs die, the New muſt take notice of them at their Peril; and the Priſoners are in Cuſtody of the Law, between the death of the Old and the coming in of the New Sheriffs.

But ſee *Co. lib.* 4. *Blomfields* Caſe, where two were bound jointly and ſeverally by Bond, both ſued and condemned, and taken in Execution, the one eſcaped, the other brought an *Audita Querela*; and held not to lie.

Vide Rolls Abridgment, 904. Where ſaid, That if *A.* be taken in Execution on a *Capias ad Satisfaciendum* at the Suit of *B.* and eſcape from the Sheriff, and no return is made of the Writ, nor is the Writ filed, or any Record made of the Award of the *Capias*; *B.* may have a *Scire Facias* againſt *A.* and thereupon what Execution he will.

And ſee *More*, Caſe 1177. and *Hob.* 55, & 56. *Foſter* and *Jackſons* Caſe, If the Defendant die in Execution, this is a diſcharge of the Execution for ever, as an Eſcape is: Yet *Co. lib.* 5. 86. *contra.*

But by *Hob.* 59. If two be bound jointly and ſeverally to me, and I ſue them jointly, I may have a *Capias* againſt them both, and the Death or Eſcape of the one ſhall not diſcharge the other: But I may not have a *Capias* againſt one, and another kind of Execution againſt the other, when I ſue them jointly: But when I ſue them ſeverally, I may ſever them in their ſeveral kinds of Execution

ecution; but yet ſo, as if a very ſatisfaction be had of one, or againſt the Sheriff upon the Eſcape of one, the other may be relieved by *Audita Querela*.

But if a *Capias ad Satisfaciendum* be had againſt one of them in this Caſe, ſo as there is ſuch an Execution as is a Satisfaction, no other can be had againſt him, or his Heir or Executor, if he dies, here none may be had againſt either of the others: For where the Law gives three or four kinds of Execution by way of Choice, and the Plaintiff chooſeth a *Capias ad ſatisfaciendum*, and the Defendants Body is taken thereupon, it cannot be for part as in a *Fieri Facias*.

Vide Anderſon, Part 1. Caſe 166. Where the Plaintiff ſued a *Capias ad Satisfaciendum* againſt one of the County of C. that was brought into Court in Cuſtody of the Sheriff, where the Plaintiff was preſent, and being asked by the Court, whether he would pray, that the Priſoner might be committed to the Fleet, anſwered, that he would not.

And this he did becauſe the Priſoner was poor, and not able to pay, and had eſcaped out of the Sheriffs Cuſtody, againſt whom, he ſaid, he intended to bring his Action; and thereupon the Court diſcharged him of his Execution, not committing him to the Fleet, nor leaving him in the Cuſtody of the Sheriff, becauſe the Sheriff did not pray it.

Then

Then, *as to the Force of an Elegit.* *Elegit.*

See *Weſtm.* 2. *cap.* 18. *Dyer* 206, 335. *Co. lib.* 7. 49. *& lib.* 4. 67, 68. *Fitzh. Nat. Brev.* 48. *Plowd.* 224. 178. 2 *H.* 4. 14. *Bulſtrode part* 2. 98, 99. *Lane* 20. That upon an *Elegit* the Sheriff is to make Execution of a moiety or one half of all the Houſes, Lands, Meadows, Paſtures, Rents, Reverſions and Hereditaments, whereof, and wherein the Defendant at the time of the Judgment had, or after had any ſole Eſtate, or Intereſt, in Fee, Tail, or for Life, into whoſe hands ſoever the ſame do afterwards come. Its Force.

So alſo, if the Husband and Wife do hold Lands for their two Lives, they are Extendable upon this Writ.

But a Right only to Land, an Annuity, Copyhold-land, the Land the Husband holds in Right of his Wife in Fee, or for Life, is not Extendable after her Death, nor liable to Execution.

And all the Goods and Chattels, except only the Beaſts of the Plow, which the Defendant hath, or at time of Execution had, are liable to Execution on this Writ, as on a *Fieri Facias:* But no Goods and Chattels really, and *Bona Fide* made away before Execution, are liable to be taken upon this Writ.

Vide Hob. 57. An *Elegit* may be ſued of Lands in *Ancient Demeſn.*

And *ibidem*, it may be ſued after a *Capias* or *Fieri Facias* both, and after a *Capias* returned *non eſt inventus.*

But

But by 13 *H.* 7. 1 *Co. lib.* 5. 87. 25 *H.* 7. 15. 33 *H.* 6. 47. 28 *H.* 8. 9. 19 *H.* 6. 4. & 17 *Ed.* 4. 4. after an *Elegit* ſued out and returned, the Plaintiff may not have a *Capias ad Satisfaciendum*, or a *Fieri Facias*; but he muſt have an *Alias Elegit*, or an *Elegit* in another County.

And by *Hob. ubi ſupra*, The Plaintiff may have an *Alias Elegit*, or an *Elegit* in divers Counties, one after another.

And *Idem* 58. An *Elegit* may be had for a *Reſidue* after a part is levied by a *Fieri Facias*; and if upon the *Elegit* nothing be taken but Goods, which are not enough, the Plaintiff may have a *Fieri Facias*.

But *ibidem Dubitatur*, whether if a Leaſe of Lands for three years be taken, which is not enough, if now the *Elegit* be Peremptory.

Execution againſt Bail or Mainpriſe.

Then ought to be known, *How a mans Bail, or Mainpriſe ſhall be had in Execution or diſcharged.*

Mainpernors, what?

For which ſee, firſt, 47 *Edw.* 3. 25. & 26. That *Mainpernors* are there taken but to obſerve the day, that is to ſay, They are ſuch Perſons as do take or receive a man into Friendly Cuſtody, that otherwiſe is, or might be Committed to Priſon, upon ſecurity given by them for his forth-coming or appearance, at the day aſſigned, or return of the Writ, or Proceſs: So that he that is *Mainpriſed*, is always ſaid to be at large, and go at his own liberty, not of Ward, after the day is ſet to *Mainpriſe*, until the day of

of appearance, by reaſon of Summons, or otherwiſe.

But it is otherwiſe, where a man is let to Bail to four or two Perſons by a Judge till ſuch a day, for there he is always accounted by Law to be in their Ward or Cuſtody for the time. Bail, what?

And they may, if they will, keep him in Ward or Priſon all the time, or otherwiſe at their pleaſure; ſo that he that is ſo Bailed, ſhall not be ſaid by the Law to be at large, or at his own liberty.

For, as before, 47 *Ed.* 3. in *Treſpaſs* the Defendant coming in by *Capias* found *Mainpernors*, and had a *Superſedeas*, and at the day appeared, and made an Attorney, and the *Mainpernors* diſcharged: But Experience is otherwiſe at this day, for the *Mainpernors* now anſwer the Execution in default of the Principal.

And 8. *H.* 4. 21. three Perſons brought a *Homine Replegiando*, and found *Mainpernors* to proſecute with Effect, where ſaid, That if they fail, the Defendant ſhall have Execution againſt the *Mainpernors*.

And 2 *H.* 4. 6. an *Inqueſt* did paſs againſt the Defendant, who was demanded, and came not, and his *Mainpernors* awarded to Priſon, *quod nota*, *Quære tamen inde*, for by experience at this day, no Execution can be had againſt the *Mainpernors*, unleſs ſome Writ of Execution be returned againſt the Principal, *Nichil*, or *Non eſt Inventus*, and the Bail or Mainpriſe be diſcharged upon the bringing in of the Principal, either hang-

hanging the Plea, or after Judgment before Execution; for after Execution is once had againſt the Bail or *Mainpernors*, the Principal is diſcharged; *Quære tamen inde.*

And this Bail may be after diſcharged, as by death of the Principal, *Demiſe* of the King, *&c.*

And as 32 *H.* 8. *Brook Tit. Mainpriſe*, If a Record be removed out of *London* by a Writ of Priviledge, altho' the ſame be after Remanded by *Procedendo*, yet the *Mainpernors* are diſcharged.

The like where Judgment is to Replead, and the Plaintiff makes a New Declaration; But if the Priviledge were never allowed, then it is otherwiſe, as it ſeems 31 *H.* 8. *Procedendo* 13. and Surety in *Brook* 28.

See likewiſe 38 *H.* 6. 4. 12. Where one having cauſe of Priviledge in the Court of Common Pleas, was Arreſted in *London*, and drawn into Plea in one of the Sheriffs Courts there, and before Judgment he delivered a *Superſedeas* to the Inferior Court, yet they proceeded to Judgment, and the Party was taken in Execution, and brought by *Habeas Corpus* in the Court of Common Pleas, and the Court awarded, That the Party ſhould be diſcharged of the Execution.

Vide Co. Rep. lib. 5. *fol.* 70. If the Principal upon a Special Bail do not pay the Mony, or render his Body, after Judgment, in diſcharge of his Bail, then (and not before) Execution is to be had againſt the Bail.

And

And ſee *Goldesbroughs Rep.* fol. 175. Where ſaid, That Execution may not be ſued out againſt the Bail, till a Default be returned againſt the Principal.

But by *Hob.* 116. If the Bail be in Execution, and a Writ of Error be brought, the Court may not diſcharge him.

Vide Touch. Prec. 64. If a *Capias* be awarded, and returned *non eſt inventus* againſt the Principal, and the Bail bring him not in, if the Principal die, altho' there be no *Scire Facias* againſt the Bail, yet the Bail is chargable; for tho' the Court will excuſe the Bail, yet the Bail if they bring in the Principal before the return of the ſecond *Scire Facias*, this is *ex gratia Curiæ*, and not of neceſſity.

And *Mich.* 14 *Jacobi in C. B.* The Caſe was, That Judgment was given againſt one in the King's Bench, upon which he was in Execution, and had another Judgment againſt him in the Common Pleas; in which Court, the Sureties to ſave their Bail, brought him to Bar by *Habeas Corpus* to render his Body; but, before that, he had brought a Writ of Error in the King's Bench to reverſe the Judgment in the Common Pleas; but the Record was not removed: In this Caſe the Court ſaid, 'That when a Man 'comes in to ſave his Bail, he ſhall not be 'Committed, if the Party do not pray it; 'but when Error is brought, before that he 'be in Execution, it is a *Superſedeas*, ſo that 'they cannot Commit him at the Prayer of 'the Party.

And

And *Waller*, *Prænotary*, ſaid, 'That the 'Bail is to render the Principals Body in 'Execution, ſo that the Plaintiff may have 'it in Execution; but here he cannot, in re-'gard a Writ of Error is brought, and there-'fore the Bail ſhall be diſcharged.

Vide Latch's Rep. fol. 192, 193. One had Judgment in Debt in the Common Pleas againſt the Defendant, and there, after the year, without any *Scire Facias* took out a *Capias* againſt him, and Arreſted him; and upon this he brought Error in the King's Bench, where the Judgment was affirmed; whereupon he was diſcharged, and the Plaintiff took him again by a *Capias ad Satisfaciendum*, without any *Scire Facias* out of the King's Bench; and there this difference was taken, where one is lawfully taken in Execution, and after diſcharged by Writ of Error, upon which Judgment is affirmed; there a New *Capias* will not lie againſt him, but Execution ſhall go out againſt the Sureties, unleſs he will render himſelf; but otherwiſe, where one was never lawfully in Execution, when the Judgment is reverſed, there he may be taken again.

Vide Rolls Abridgment 888. If in Debt againſt *J. S.* two become Bail for him, and the Plaintiff Recover, and the Proceſs continued till Judgment againſt the Bail, Execution may be againſt either of the Bail, without naming the other.

And

And, *Idem* 896. he may have *Execution* againſt one of the Bail at one time, and after have *Execution* againſt another of the Bail.

But, *Idem* 897. if a man have once *Execution* againſt the Bail, he may never after have *Execution* againſt the Principal: Or, if once againſt the Principal, never after againſt the Bail.

And, *Idem ibid.* if the King Recover in a *Scire facias*, on a *Recognizance* acknowledged in *Chancery*, he can have no *Execution* againſt the Body: But a *Capias* lies on a Judgment in a *Scire facias* on a *Recognizance* acknowledged by the Bail, in an Action in the *Kings-Bench*.

But no *Capias* will lye upon a Judgment in a *Scire facias*, on a *Recognizance* acknowledged by the Bail in the *Common-Pleas*; but there an Action of Debt will lye upon the *Recognizance*.

So, if the *Bail*, in an *Inferiour Court*, enter into a *Recognizance*, That if the Principal pay not the Damages and Coſts recovered, or render himſelf to Priſon; *Tunc Concedit* the Damages and Coſts, *de terris & catallis ſuis levari ad opus Querentis*, no *Capias* will lye upon this *Recognizance*.

So, neither for the Plaintiff in *Detinue*, to recover Damages againſt the *Garniſhee*, becauſe (as by 7 *H.* 6. 45. before-cited) not party to the Writ.

So, if an *Inferiour Court* be held by Charter, and the Bail there Enter into Recognizance, no *Capias* will lye for this.

But by *Hobart* 284. Abridged by *Rolls* 898. If the *Principal*, after Judgment, render his Body in Court *in Exonerationem Manucaptorum*, and the Plaintiff doth not take him in *Execution*, and this is Entred of Record (as it muſt be) the Plaintiff may after this Take him in Execution by *Capias ad ſatisfaciendum*.

And, *Idem* 899. if *A.* Recover againſt *B.* in the *Kings-Bench*, Damages and Coſts, and upon this hath Judgment againſt the Bail, after *Scire facias*; and after *B.* and the Bail joyn in a Writ of *Error* upon the Statute, in the *Exchequer-Chamber*, and while this is Tranſacted, the Year and Day is Elapſed; in this Caſe, the Court of *Kings-Bench* may grant *Execution*: For it is a void Writ of Error, and as if none had been brought.

And, *Idem* 891. if a Recognizance of *Bail* be taken by a Judge of the *Kings-Bench* at *Serjeants-Inn* in *London*, upon an Original brought in *London*, and it be Certified and Inrolled in the *Kings-Bench*; it ſeems it may be extended in *London* or *Middleſex*.

Execution by, or without *Scire facias*.

In the next place we ſhall Conſider, *Where* Execution *may be had by* Scire facias, *and where it may be had without*.

Scire facias, what.

And, firſt, as to the Writ of *Scire facias* ought to be known, That *Execution* muſt be had within a Year of the *Judgment*; otherwiſe it cannot be taken out, till there be firſt ſued out a *Scire facias*, which is a *Writ Judicial* going out of a *Record*, and lies, where

where one hath recovered Debt or Damages in the Kings Court, and he ſueth not to have *Execution* within the Year and Day, he muſt have his Writ to warn the Party, and if the Party comes not, or if he comes and ſays nothing in diſcharge or ſtay of the *Execution*, then the Plaintiff ſhall have a Writ of *Fieri facias*, to Command the Sheriff to levy the Debt or Damages of the Defendant's Goods.

Or, where the Proceſs is a *Capias*, he may have another Writ of *Execution*, called a *Capias ad ſatisfaciendum*, to Take and Impriſon the Body of the Defendant, till he ſatisfie the Party, Plaintiff.

And ſo on a *Judgment* to Recover Lands; if the Plaintiff do not ſue out *Execution* within the Year after the *Judgment*, he may not have *Execution* till he have firſt Summoned the Defendant to ſhew Cauſe, why *Execution* ſhould not be had againſt him.

And if the Defendant cannot be found upon Summons, or cannot, or doth not ſhew Cauſe, why Execution ſhould not be made, then a *ſecond Judgment* is awarded, That *Execution* be done upon the *firſt Judgment*.

And here (by *Co.* 1 *Inſt.* 290. and *Dyer* 148.) this Writ of *Scire facias* being Entred, the Tenant or Defendant may thereunto plead any Matter accruing after the Judgment, as *Releaſe*, *Outlawry*, *&c.* to prevent the *Execution*.

But it appears by *Old Natura Brev.* 163. *Dyer* 270, 271. *Hobart* 56, & 57. *Cro.* 1 Part 185. *Bulſtr.* 2 Part 230. *Lane* 16. *Finch*'s *Ley* 477. That if the Plaintiff ſue out *Execution* within the Year, he may Continue the *Judgment* after the Year, without *Scire facias.*

But ſee *Fitzherbert*'s *Natura Brevium*, Tit. *Scire fac'*, and *Brook*'s *Abridgment* 134. by which (as alſo by divers other Books) it appears, That *Execution* may be had within the Year againſt a Party to the Judgment, without a *Scire facias*; but otherwiſe, if the Record be removed into another Court.

And with theſe Authorities doth agree 14 & 15 *H.*7. And it appears alſo there, That the *Year* ſhall not be accounted from the Time of the *Recognizance*, but only from the Time of the *Payment.*

And, 23 *H.*8. *ibid.* 119. if one Recover in *Annuity*, a *Fieri facias* ſhall go out within the Year, and after *Scire fac'* infinite, becauſe *Executory.*

And with this agrees *Bro.* 28. where ſaid, That if one Recover in a Writ of *Annuity*, he may have a *Fieri facias* of the Arrerages incurred within the Year, and a *Scire facias* after, as oft as the Annuity is behind, and no Writ of *Annuity* after. And in every *Scire fac'* in which he Recovers, after the firſt Judgment, he ſhall have Execution of the *Arrerages* within the Year, by *Fieri facias.*

And 11 *H.* 4. 34. *Bro.* 119. after Judgment had in *Annuity*, the Plaintiff after a *Scire fac'* may have a *Fieri fac'*, to levy it as it becomes due.

And 21 *Ed.* 4. 1, & 2. if Rent be granted by Fine, the Party may have a *Scire fac'* in *Infinitum* (as before in *Annuity*, or) as in Covenant upon Covenant, as one Recovering in Treſpaſs may bring a New Action.

And 22 *H.* 6. 15. *Bro.* 54. one Condemned in the *Common-Pleas*, and in Execution, Attainted after in an *Aſſize*, Remanded alſo thither, and could not be Committed there, for that Execution alſo, without Proceſs.

And ſee 39 *Ed.* 3. 15. *Bro.* 122. One had a *Scire fac'*, to Execute a Judgment in a *Præcipe quod reddat*, and Execution thereupon by Default; and after ſurmized to the Court, That the Perſon againſt whom he had his Writ of *Scire fac'* and *Judgment*, was not Tenant, but one *B.* againſt whom he had another *Scire fac'*; *quod nota.*

And Note, by the Book of 22 *H.* 6. 11, & 12. That at the Common Law, until the Statute of *Weſtm.* 2. *De hiis quæ, &c.* If one had Recovered in Debt, and taken out no *Scire fac'* within the year, he was obliged after the year to take out a New Writ of *Debt.*

And ſee by the Book of 5 *Ed.* 4. and Experience, That where a *Scire fac'* is had upon a *Judgment*, there ſhall be no Execution

without a Garniſh, (*i. e.* giving Notice, or Warning to the Party) or two *Nichils* returned.

Vide 19 *Ed.* 4. 5. where ſaid, That in all Caſes where the Heir, Executor, or Adminiſtrator may ſue to have an Execution of any thing recovered by the Anceſtor, Teſtator, &c. he muſt firſt have a *Scire facias* againſt the Party againſt whom the Judgment is had, to warn him to ſhew Cauſe, why Execution may not be had for him againſt the Defendant; and then if he either make Default, or at his Appearance cannot ſhew good Cauſe, why Execution ſhould not be had againſt him, Execution ſhall be awarded for the Plaintiff, as it ſhould have been for him under whom he claimed.

Vide Roll's Abridg. 890. If one recover Damages of *A.* whereof part is levied by a *Fieri facias*, but not all, and *A.* dies; the Plaintiff may have a *Scire fac'* againſt the Heir at his Election.

And, *Idem* 900. a *Scire facias* lies upon a Recognizance (if the Conuſor be dead) againſt the Heir in general, or againſt *J. S.* Son and Heir of the Conuſor, without ſuing of the Ter-Tenants, for he ſhall have no Contribution againſt the Ter-Tenants.

And ſee *Dyer* 208. If a Judgment be had againſt one that hath Land, who dies, and the Land diſcends to his Heir, after a *Scire facias* had, he may have Execution of this Land in the Heirs hands, by *Elegit* againſt him.

Vide

Vide Co. Lib. 5. 88. If a Judgment be had in the *Common-Pleas*, and removed from thence by Writ of *Error* into the *Kings-Bench*, and there confirmed within the year; the Plaintiff may have the ſame kind of Execution in that Court, as he might have had in the *Common-Pleas*, without any *Scire facias*.

But by *Hob.* 196, 197. where the firſt Action is laid, there the Execution muſt be by *Scire facias*, if it be had.

Vide Godbolt 76. where *W.* had Judgment in Debt, in the *Common-Pleas*, againſt *F.* and after the Year, without *Scire facias*, took out a *Capias* againſt him, and Arreſted him; whereupon he brought *Error* upon the Judgment in the *Kings-Bench*, where the Judgment was affirmed, and *F.* was diſcharged. *W.* took him again by an *Alias Ca. ſa.* without any *Scire fac'* out of the *Kings-Bench*, and upon that the Sheriff returned a *Cepi*. It was Moved, He might be diſcharged, for that having been once in Execution in the *Common-Pleas*, and ſet at liberty, by Sureties, in the *Kings-Bench*, upon a Writ of *Error*, he ought not to be taken again: But deny'd by the Court. For there ſaid, That one being in Execution, and diſcharged by *Privilege*, may be in *Execution* again. *Vide* Tit. *Error*, Diviſion 1.

But 16 *H.* 7. 2. and 21 *Ed.* 4. 67. as alſo 8 *H.* 7. 10, & 12. *contra.*

Vide Cro. 1 Part 334. where Judgment was had in Debt by Husband and Wife, for the Debt of the Wife, as Adminiſtratrix of her former Husband, and after Judgment and before Execution the Wife died; the

Husband brought a *Scire facias*, and *Scire feci* being Returned, had Judgment by *Nichil dicit*; and held, the *Scire fac'* ought not to have been brought by the Husband; but being done, the Judgment thereupon, though Erroneous, muſt ſtand, till Reverſed by *Error*.

Matter and Pleas that ſtay Execution.

Next, we ſhall conſider, *What Plea or Matter will ſtay Execution.*

For which ſee firſt 10 *H.* 6. 6. That in *Debt*, or *Scire fac'* upon a *Judgment*, or *Rediſſeiſin*, no Plea that the Defendant hath *Error* hanging of the firſt Judgment.

And ſo is 37 *H.* 6. 16. in a *Scire facias* in the *Common-Pleas* after the Record removed, until it be Reverſed: For its there ſaid, that 'tis but *Tenorem Recordi* removed, and that if nothing be done in the *Kings-Bench* upon Error, or the Judgment be affirmed, then at the Election of the Plaintiff in the firſt Judgment, he may have Execution in the *Common-Pleas*; *quære tamen.*

But 19 *H.* 6. 7, & 8. if the Record be not removed, or the Party be not delay'd, the Court uſeth to grant Execution, notwithſtanding Error.

And ſo 7 *H.* 6. 42. if the Plaintiff in Error do not ſue out a *Superſedeas*, Execution ſhall be granted, notwithſtanding his Writ of *Error* be allowed.

But 4 *H.* 6. 31. no *Debt*, or *Scire fac'*, after the Record be removed by *Error*, unleſs for a *Nomine pœnæ* in the Annuity.

See more hereof afterwards, in the Title *Error*.

Next, *What other Pleas one ſhall have in Bar of Execution.* Pleas in Bar of Execution.

See *Brook* 6. in Abridging the Caſe of 20 *H.* 6. a good Plea, That formerly the Sheriff by another Writ levied the Mony, or took the Body in Execution, although the Writ was not Returned.

And ſo 21 *H.* 6. 5. where alſo 37 *H.* 8. and 19 *Ed.* 3. are Vouched ſomewhat differing.

The like 44 *Ed.* 3. 18 in a *Scire fac'* upon Arrerages of Annuity; although there, *Payment*, or *Riens arrere*, be no Plea.

Vide Dyer 344. If a Judgment be againſt an Heir by *Nichil dicit*, in an Action againſt him on the Deed of his Anceſtor, on a *Scire fac'*, he cannot plead *Riens per Diſcent* at the time of the Writ brought; but Execution ſhall be againſt him of his own Lands by *Elegit*.

And ſee *Godbolt* 79. where Judgment was given on an Obligation of 400 l. and a *Scire fac'* was ſued on the ſame Judgment for 300 l. and the Party did not acknowledge, that he had received the other 100 l. and held, That the *Scire fac'* ſhould not Abate, and that he ſhould have Execution.

But by *More*, *Caſe* 693. in a *Scire fac'* on a Recognizance, Joyntenancy will Abate the Writ.

Vide

Vide Noy 143. where *A.* recovered againſt *B.* in Debt, and afterwards brought a *Scire fac'*, To which *B.* pleaded, That *A.* was Outlawed, and held a good Plea, if he be Outlawed after the Plea in Bar pleaded in the Action of Debt.

But otherwiſe it is if he be Outlawed before; for then *B.* might have pleaded that in Bar of the firſt Action.

And it was ſaid there, That the Mony being in Court, if the King's Counſel pray to have it for the King, they muſt ſhew the Outlawry *ſub pede Sigilli*, and he muſt confeſs himſelf the Party Outlawed.

And ſee *Godbolt* 96. where Debt was upon a Recovery in a *Scire fac'* in *London*, on a Recognizance taken in the Chamber of *London*; and it was not ſhewed, That it was a Court of Record, and that they had been uſed to take Recognizances: And Exception was taken to it, and Caſes put, That though a Judgment were void, yet Execution might be by *Scire fac'*, and the party might not plead that in a Writ of *Error*.

And this difference was taken, where Execution was ſued on ſuch a Judgment, and Debt brought upon it; and held, tho' Debt might not be brought on ſuch a Judgment, yet, That upon a voidable Judgment a man ſhould recover, and might take out Execution, and that it ſhould ſtand good until the Judgment were Reverſed.

And

And ſee *Mo. Caſe* 672. where ſaid, That in a *Scire fac'* to have Execution, it is a good Plea to ſay, That the Plaintiff hath aſſigned the Damages to the King, tho' the King hath not levied them; ſo that the Sheriff hath levied them by *Fieri fac'*, tho' he hath not Returned the Writ.

By *Co. Lib.* 8. fo. 12. if one pleads a Plea to a *Scire facias*, unto which the Plaintiff demurs, the Defendant may joyn in Demurrer, and plead over part of a Statute *ad Informandum Curiam*.

By 1 *Cro.* 65, 66. The Plaintiff ſhall not, after Iſſue, find a Fault in his own Pleadings, and take advantage thereof: As in a *Scire fac'* againſt an Adminiſtrator, *durante Minori Ætate Executoris*; the Defendant pleads, *Plene Adminiſtravit* ſpecially: The Plaintiff Replies, *Quod Devaſtavit*, but doth not ſay *Quis Devaſtavit*; but the Iſſue was, *Quod prædictus* A.B. (the Adminiſtrator) *non Devaſtavit*; and it was found for the Defendant: Upon which it was moved in Arreſt of Judgment by the Plaintiff, and alledged for Cauſe, That it is not ſaid in the Replication, who *Devaſtavit*, and ſo might be the Executor under Age; *ſed, non allocatur*, for the Plaintiff ſhall not take advantage of a Fault in his own Replication after Iſſue.

And with this agrees 1 *Cro.* 135. where ſaid, That the Plaintiff, after Verdict ſhall take no advantage of his own ill Declaration.

Vide

Vide 1 *Cro.*39. *Co.Lib.*5.39.*b. Lib.*7.4,6. *Lib.* 8.59.

Vide Mo. Caſe 11. fo. 78. where an Executor pleads to a *Scire facias* upon a Judgment againſt him, *Plene adminiſtravit jour del Brief purchaſe*, and ill, for he might have paid Specialties before.

The like, if he had pleaded *Nulla bona temps del mort le Teſtator, ou unque puis*; but the Plaintiff loſt the advantage he might have made of that ill Plea, by taking Iſſue.

Where there be ſeveral Defendants, they muſt joyn in *Dilatories*, tho' they may ſever in *Pleas* to the firſt Action.

As *Paſch.*26 *H.*8.*Pl.*7. where a *Scire facias* was brought againſt Two, for Damages recovered in *Aſſize* by Three; one of the Defendants pleaded, That one of the Plaintiffs ſuggeſted by the Writ, to be dead, was alive at the time the *Scire facias* was brought; and the other Defendant pleaded, That another of the Plaintiffs ſuppoſed by the Writ to be alive, is dead; and *ill:* For they ought to Joyn in their Pleas to the *Scire facias*, becauſe they are *Dilatories*; tho' there ſaid, they might have ſevered in their Pleas at firſt to the Writ or Action.

But *Mich.*7 *H.*7. *Pl.* 8. *Mich.* 10 *H.*7. *Pl.*6. and *Mich*, 12 *H.* 7. *Pl.* 3. one Imparls, and the other demands the View in a *Præcipe quod reddat: Quære tamen de hoc.*

Then,

Then, of the *Venditioni Exponas*. *Venditioni Exponas.*

If the Sheriff Return——*Quod cepit bona ad Valenciam, Et quod non invenit Emptores*, the ſame Writ of *Venditioni Exponas* is to be awarded out.

Touching which ſee 34 *H.* 6. 36. where the Sheriff did Return, That the Goods were not taken by him, but by his Predeceſſor, *Et ideo venditioni exponere non potuit*; and thereupon a *Diſtringas nuper Vic'* was awarded: See the Form thereof in *Brook* 11.

And ſee *Cro.* 1 Part 567, 568. where the Sheriff took Goods on a *Fieri facias*, and before Sale the Record was removed by Error, and a *Superſedeas* awarded; and yet upon *Cepit bona* return'd by the Sheriff, a *Venditioni Exponas* was awarded.

And by *Yelverton* 6. If one recover Debt on an Obligation, and delivers a *Fieri facias* to the Sheriff, to levy the ſame, and the Defendant brings a Writ of *Error* upon the Judgment, and hath a *Superſedeas* upon it to the Sheriff; here ſo much Goods as the Sheriff took by virtue of the *Fieri facias*, before the *Superſedeas* came to him, ſhall be liable to ſatisfie the Plaintiff, and a *Venditioni Exponas* ſhall go out upon it: But after the *Superſedeas* comes to the Sheriff, he muſt not proceed upon it.

And by *Dyer* 363. If the Sheriff Return upon a *Fieri facias*——*Quod cepit bona, & non invenit Emptores*, or delay to deliver the Goods, the Plaintiff ſhall have a *Venditioni Exponas* to compel him to ſell the ſame, and

and bring in the Mony: But if he Return, That the Goods were taken by his Predeceſſor, the Plaintiff may have a *Diſtringas super Vic'*, to Command the former Sheriff to ſell the Goods, and bring in the Mony.

But by *Co. Lib.* 3. 12. after the Sheriff hath Returned on a *Fieri facias*, —*Non invenit Emptores*, the Plaintiff cannot have a *Capias ad ſatisfaciendum*, or an *Elegit*.

Vide Co. Lib 5. 90. If the Sheriff levy Mony on Execution, and give it to the Plaintiff, tho' he Return not the Writ, yet the Execution is good: And the Sheriff ought to uſe his utmoſt Endeavour to levy the Mony on a *Fieri fac'* upon the Defendant's Goods and Chattels, and for that purpoſe to Enquire after them; and it behoves the Plaintiff to Enquire alſo, and ſearch diligently if he can find any; and upon finding them, to give Notice to the Sheriff, who *ex Officio* is to take and ſell them, if he can; otherwiſe he muſt be Impowered by a *Venditioni Exponas*; by virtue whereof he may ſell them, and give the Plaintiff his Mony.

But by *Yelverton* 44. If the Sheriff do ſeize the Defendant's Goods on a *Fieri fac'*, the Property is not altered; yet the Sheriff may not ſell them without a *Venditioni Exponas*, where he hath made no Return of his Writ, and is out of his Office.

Their

Then, *Touching Execution againſt a Clerk.* If the Sheriff Return, *Clericus eſt Beneficiatus* upon a *Fieri fac'*, then ſhall be awarded a Writ to the Biſhop, to Sequeſter his Spiritual Promotion. See thereof 13 *H.* 4. Abridged by *Brook*, *Pl.* 38. *Clericus Beneficiatus.*

But that ſeems upon the Return of *Nulla habet bona, &c.* See hereof more in *Brook*, *Proceſs* 2.

And ſee 21 *Ed.* 3. 7. *Bro.* 44. That if the Party Condemned be preſent in Court at any time within the Year and the Day, and deny not, but that he is the ſame Party, the Court, at the Requeſt of the Plaintiff may Commit him in Execution: Otherwiſe, after the Year and the Day; *quod nota.* Where the Defendant may be Committed by the Court, without Proceſs.

And ſo 21 *Ed.* 4. 13. if the Defendant be preſent in Court at the Judgment.

See alſo accordingly, *Dyer* 2 *&* 3 *Eliz.* 182, 183. and 14 *Eliz.* 306.

And ſee more hereof in *Bro.* Tit. *Office de Court.*

And ſee 21 *Ed.* 3. 29. where, upon a Return of a Writ of *Execution* upon a *Statute Merchant* Returned *Nichil*, the Plaintiff did ſurmize, That the Lands did lye in the *Cinque Ports*, and had a Writ of *Execution* to the *Conſtable* of the *Ports.* Of Executions in the Ports or Franchiſes.

And ſee 1 *Ed.* 4. 10. for Lands in *Durham.* In *Durham.*

And by 22 *Aſſ.* 12. Execution ſhall be in *Court Baron*, but by *Diſtreſs*; as in a *Return Irreplegiable.* In Court Baron.

Yet 38 *Ed.* 3. 3. ſeemeth otherwiſe.

And

And ſo ſeemeth 7 *H.* 4. Abridged by *Bro. Pl.* 26.

Of the Sheriffs Breaking open a Door, or Cheſt, to do Execution.

And ſee 18 *Ed.* 4. 4. and *Co.* 5 Part 93. That if the Sheriff do make Execution upon a *Fieri facias*, or otherwiſe, at the Suit of a Common Perſon, and break open his Houſe, Door, or Cheſt, Treſpaſs doth lye againſt him, for Breaking of his Houſe, Door, or Cheſt, although the Execution will be good; *fieri non debet factum valet.*

Yet by 18 *Ed.* 2. Abridged by *Fitzherbert*, Tit. *Execution* 152. The Sheriff may break Door or Cheſt to do Execution; for otherwiſe th Plaintiff ſhall loſe the Effect of his Suit.

Franchiſe.

And 11 *H.* 4. 7, & 9. if the Sheriff enter into a *Franchiſe*, and do Execution, the ſame is good according to the Rule above; and yet he is a Treſpaſſor to the Lord of the the *Franchiſe*, who may have an Action of *Treſpaſs upon the Caſe* againſt him, for Infringing his Liberty. But if a Bailiff of a Franchiſe do any ſuch Execution without his Franchiſe, that will be void.

And by 40 *Ed.* 3. 21, & 22. The Sheriff in Execution of Dower of Rent cannot drive the Beaſts from the Ground, although he may deliver Execution by the Beaſts, a Clod, or Bough.

But upon a *Capias Utlagatum*, or a *Capias* for Felony, the Officer may break open the Doors.

Otherwiſe (as it ſeemeth) not, although the Execution be a *Non omittas propter aliquam Libertatem.*

But

But the Sheriff, or his Under-Officer, may (as it ſeemeth) upon any *Capias*, Enter into any mans Ground, or Houſe open, to Arreſt any man that he ſeeth Enter; and if his Priſoner Eſcape, may follow and break open Doors to take him. *Quære inde.*

And ſee *Bro. Abridgment*, Tit. *Faux Impriſonment.*

And by Juſtice *Jones* and *Berkley*, 12 *Car.* 1. in *B. R.* If the Sheriff have a *Fieri facias*, or *Capias ad ſatisfaciendum* againſt a man, and before Execution he pay him the Mony, he may not do Execution afterwards; for if he do, Treſpaſs, or Falſe Impriſonment will lye againſt him for it.

And ſee *Co.* 4 Part 91. *Finmayn's Caſe*, where it appeared, That there were two Joint-Tenants of a Houſe, one of which acknowledged a Statute, and died poſſeſſed of divers Goods therein; and the Sheriff came to Extend the Goods, and he and the Jury offered to Enter the Houſe, to Extend the ſame; but the Defendant, intending to diſturb the Execution, ſhut the Door, ſo as the Sheriff could not Enter to do his Office.

In which Caſe, theſe Points were Reſolved;

Firſt, That if a Recovery be in a Real Action, or in an *Ejectione firmæ*, the Sheriff upon an *Habere facias Seiſinam*, or *Poſſeſſionem*, may break the Houſe to do Execution; becauſe after the Judgment, it is not the Houſe of the Defendant.

Secondly, In all Caſes where the King is Party, after the Sheriff hath ſignified the Cauſe of his coming, if no Door be open, he may Break open the Houſe to do Execution; but if he may Enter it without Breaking of it, or upon a Requeſt, if in ſuch Caſe he Break the Houſe, he is a Treſpaſſor.

Thirdly, In all Caſes of a Common Perſon, If the Door be open, the Sheriff may Enter the Houſe of a Subject, to do Execution againſt Body or Goods.

Fourthly, That it is not lawful for the Sheriff, upon Requeſt and Denial, in Caſe of a Common Perſon, to Break the Houſe of a Subject, to Execute any Proceſs: And the Sheriff cannot Break the Houſe by virtue of a *Fieri facias*, but he ſhall be a Treſpaſſor: But if he doth ſo, and doth Execution, the Execution done by him is good.

And ſee for this *Co.* 11 Part 82. *Bowle's* Caſe; and ſee 18 *Eliz.* 44. by all the Juſtices.

Diſcharge by Error, and Mainprize.

Then ought to be known, *How one in Execution ſhall be delivered without Payment.*

And therefore, by 16 *H.* 7. 2. If the Party be in Execution, and the Record be removed by Error, and he find *Mainpriſe* to Proſecute with Effect, and to ſatisfie, &c. although the Judgment be affirmed, he ſhall never be in Execution by his Body upon the ſame, unleſs he will render his Body, to ſave his Sureties voluntarily.

And

And ſo is 21 *Ed.* 4. 67. if the Plaintiff be once in Execution.

And ſo is 8 *H.*7. 10.

But by the ſaid two Books laſt cited, If no Execution be awarded before the Writ of Error, then Execution in the *King-Bench* may be awarded. Execution in B.R. after Error.

And ſo is 6 *Ed.* 4. 19. If a Judgment in a Mean Court be reverſed by a Writ of *Falſe Judgment*, or Error in the *Common-Pleas*.

And ſo is 12 *H.*4. 24. if he that Removed the Record do nothing.

See accordingly 39 *H.*6. 3 & 4. and after, in the Title *Error*.

Then is to be Obſerved, *That in ſome Caſes an* Eſcape *is a Diſcharge of Execution for ever*: As namely, *If the Priſoner in Execution go at large, by Conſent of the Plaintiff, or of the Gaoler.* Diſcharge by Eſcape.

But as 13 *H.*7. 1. is, If he Break Priſon of himſelf, and afterwards the Gaoler take him again, becauſe of his own Wrong, whereof he ſhall have no advantage, he ſhall remain for the firſt Execution, unleſs the Plaintiff, by bringing an Action of Debt againſt the Gaoler, do refuſe that Advantage againſt the Priſoner.

And ſo ſeemeth *Stamford*.

Yet 14 *H.*7. 1. although the Gaoler may take him, yet the Plaintiff ſhall have no Advantage thereof.

But by 11 *H.*4. 12. the Plaintiff may alſo have Debt againſt the Party.

And by 41 *Aſſ.* 15. after an Eſcape of the Priſoner and Death of the Keeper of the Priſon, the Plaintiff prayed a New *Capias* againſt the Defendant, and it was granted.

Quære, If not to be in Execution again, becauſe no Remedy elſe for the Plaintiff.

And 33 *H.* 6. 47. If the Party in Execution die, the Debt is diſcharged.

So, againſt him, if he Eſcape.

See *Mo. Caſe* 1177, and *Hobart* 55, 56. *Foſter* and *Jackſon*'s Caſe; where ſaid, That if the Defendant die in Execution, it is a Diſcharge of the Execution for ever, as an Eſcape is.

Yet ſee *Co.* 5 Part 86. *contra.*

But by *Hob.* 59. If two be Bound joyntly and ſeverally to one, who ſues them joyntly, he may have a *Capias* againſt them both, and the *Death* or *Eſcape* of the one, ſhall not diſcharge the other.

But he may not have a *Capias* againſt one, and another kind of *Execution* againſt the other, when he ſues them joyntly; but if he ſues them ſeverally, he may ſever them in their ſeveral kinds of Execution; but yet ſo, as if once a very Satisfaction be had of one, or againſt the Sheriff upon the Eſcape of one, the other may be relieved by *Audita Querela.*

But if a *Capias ad ſatisfaciendum* be had againſt one of them in this Caſe, ſo as there is ſuch an Execution as is a Satisfaction, no other can be had againſt him, or againſt his Heir or Executor, if he die: For where the Law gives ſeveral kinds of Execution, by

by way of Choice, and he Chuſeth a *Capias ad ſatisfaciendum*, and the Body is taken, it cannot be for part, as in a *Fieri facias*.

But ſee the Statute of 21 *Jac.* 1. *cap.* 24. how the Law is thereby changed in this Point. For it is Enacted by that Act, *That he, or they, at whoſe Suit any Perſon is charged in Execution, for Debt or Damages recovered; their Executors or Adminiſtrators may, after the Death of the Perſon ſo charged in Execution, lawfully ſue forth New Execution againſt the Lands and Tenements, Goods and Chattels of the Perſon ſo Deceaſed, in like manner, as if the Perſon Deceaſed had never been in Execution.*

And ſee *Roll*'s *Abridgment* 903. That if one Recover in Debt againſt *J. S.* and then Outlaw him on the Judgment; and afterwards *J. S.* is taken within the Year by *Capias Utlagatum*, at the Suit of the King, and dies in Priſon before any Prayer made by the Plaintiff, *That he might be in Execution at his Suit:* This is no Satisfaction; therefore the Executor or Adminiſtrator of him that is dead, may be charged for the Debt, notwithſtanding he was in Execution by being taken upon the *Capias Utlagatum*.

But by *Anderſon* 1 Part, *Caſe* 273. if one that hath an Execution of Land, Releaſe one Acre of the Execution, all is Extinct by the Releaſe of the Execution in one Acre.

And by *Hobart* 60. If the Party in Execution Eſcape of his own wrong, the Plaintiff can have no other Execution of him or of his Executors. But if he take one in

Execution, where there are ſeveral Debtors by one Obligation, there he may take another after the Eſcape of that one; or he may have Satisfaction from the Sheriff upon the Eſcape, at his Choice.

And by *Co.* 5 Part 86. and 6 Part 13. and 8 Part 152. and *Dyer* 152. If the Defendant pay the Mony, he is diſcharged: But if the Plaintiff makes any Releaſe, or other ſuch like Act, to the Defendant, being in Execution, amounting to a Diſcharge; this will not be a Diſcharge *Ipſo facto*, but by this means he may have a Diſcharge. And yet, if the Plaintiff himſelf ſhall deliver the Priſoner out of Execution, he is thereby *Ipſo facto*, diſcharged of the Execution for ever.

So, if the Plaintiff doth acknowledge Satisfaction upon Record.

So, by 13 *H.*7.1. *Plowd.Com.*36. and 33 *H.* 6.47. If one taken in Execution upon a *Capias ad ſatisfaciendum* doth Eſcape, and the Plaintiff bring his Action againſt the Sheriff, or hath a *Cepi* Returned on the Writ, and it be Filed; by this the Defendant is diſcharged againſt the Plaintiff for ever. But if no *Cepi* be Returned, nor Action brought againſt the Sheriff, the Law will Adjudge the Party to be out of Execution.

But by *Co.* 5 Part 86. If Two be in Execution for one Debt, on a Bond made by Two, and the Sheriff ſuffers one of them to Eſcape, this will not diſcharge the other, till the Plaintiff hath Recovered his Debt of the Sheriff.

But

But by *Co.* 8 Part 143. and 38 *H.* 6. 4. If one be in Execution upon a *Capias ad ſatisfaciendum*, and the Court adjudge the Judgment or Execution Erroneous, and ſo null it; by this the Defendant is diſcharged of that Execution.

Yet by *Fitz. Nat. Brev.* 146. If Two be in Execution for one Debt, and one of them dies under Execution, that will not diſcharge the other.

Diſcharge by Privilege of Parliament.

But 38 *H.* 8. *Dyer* 6. One in Execution being a *Burgeſs* of the *Parliament*, and diſcharged by a Writ of *Privilege*; doubted, whether diſcharged for ever.

But by the Statute of 1 *Jac.* 1. *cap.* 13. it appears, That if a Priſoner be delivered out of Execution by Privilege of Parliament, it is no diſcharge; but after the Privilege is gone, he may be taken again.

So, *Paſch.* 30 *H.* 8. *Dyer* 62. *Trewynyard*'s Caſe, where *Trewynyard*, being a Burgeſs of Parliament, was taken upon an *Exigent*, after a *Capias* he brought a Writ of Privilege of Parliament, and the Sheriff let him at Liberty:

In this Caſe it was Reſolved,

Firſt, That the Privilege was Grantable, notwithſtanding the Execution; becauſe the King and Realm have an Intereſt in the Body of every Burgeſs of Parliament, and the Common-Weal ſhall be preferred before the Intereſt of any private Perſon.

Secondly, That, after the Parliament ended, he might be taken in Execution again: For that the Plaintiff ſhall not be prejudiced in his Execution by the Act of the Law, which doth Wrong to no man.

Going at large by *Baſton*, i. e. *Keeper*, or *Tipſtaff*.

See 3 *Ed.* 6. *Dyer* 66 & 67. where the Sheriffs of *London*, in Debt upon an Eſcape, by going at large by *Baſton* in *London*, did plead, That their Predeceſſors let him at large, and good.

And Note, by *Dyer* 4 & 5 *Mar.* 162. 10 *Eliz.* 275. and 12 & 13 *Eliz.* 206. If the Priſoner have the King's Protection to go at large by *Baſton*, it is an Eſcape; and the Warden of the *Fleet* may be Charged upon an Eſcape.

And ſee the ſame Book of *Dyer* 10 *Eliz.* where Debt was brought againſt the Marſhal of the *Kings-Bench*, or his Deputy.

And ſee *Plowden's Commentaries*, in *Platt's* Action of Debt againſt the Sheriffs of *London*; where it ſeemeth, That by the Cuſtom of the City of *London*, one in Execution in *Ludgate*, may go by *Baſton* within *London*; but otherwiſe in *Southwark*.

But Note, the ſame Book of *Dyer*, in 3 *Ed.* 6. That the Sheriffs of *London* were there Charged, for ſuffering one in Execution in *Ludgate*, to go at large in *London* by *Baſton*; *quod nota*.

Then

Then, *Where the Act of the Court, of the Law, or of the Plaintiff, doth discharge the Party of the Execution.* Discharge by Act of the Court, Law, or Plaintiff.

As namely 24 *Ed.* 3. 44. If one recover the Land and Body in a Writ of Ward, and Releaſe the Body, the Land is thereby diſcharged.

But otherwiſe of a Grant.

The like ſeemeth 40 *Aſſ.* although the Land be Extended and Granted over.

The lik in *Pope's* Caſe, in *Plowden's Commentaries*, If the Cognizor, after Execution, Enfeoff the Cognizee of part; but it is otherwiſe before Execution; for there the Lands be in the Hands of the Cognizor, and his Body is Charged.

See 6 *Ed.* 4. 4. and 24 *Ed.* 3. 45, 46. That if one in Execution be Outlawed, or Condemned for Felony, and afterwards have his Pardon; yet touching his Body, the ſame ſhall ſtill remain in Execution. Attaint of Felony.

Notwithſtanding, by the ſame Book of 6 *Ed.* 4. if he take himſelf to his Clergy, he ſhall be out of Execution: And ſo ſeemeth the Book 7 *Eliz.* 248.; but *ibid.* 261. *è contra.*

See hereof *Bro. Abr.* 272.

And ſee 10 *Eliz.* 275. That one in Execution, by Agreement of the Parties and the Chief Juſtice, went at large for a time, and came afterwards to Priſon, and no Diſcharge. By aſſent of the Court, and Parties.

But by 4 *Mar. Dyer* 162. and 12 *Eliz.* 296. and other Books, The Licenſe of the Queen, or of the Barons of the *Exchequer*, by *Baſton*, or any of the Chief Juſtices Licenſe, is no ſufficient

ſufficient Warrant for the Gaoler to ſuffer the Priſoner to go at large.

Sheriff Fined for Diſobeying a *Superſedeas.*

Then, *Where the Sheriff ſhall be Fined for a Contempt in doing Execution, after a* Superſedeas *delivered to him.*

For which ſee *Hill.* 11 *Jac.* in *B.R. Thomas* and *Owen*'s Caſe, *Bulſtr.* 2 Part 194; where, after a Judgment in *Ejectione firmæ*, and *Habere fac' poſſeſſionem*, a Writ of *Error* was brought, and a *Superſedeas* granted, directed to the Sheriff, to ſtay Execution; and this Writ of *Error* and *Superſedeas* were ſhewed to the Sheriff, who contrary thereto did Execute the Writ of *Habere fac' poſſeſſionem.* It was holden by the Court to be a great Contempt; and a Writ of *Reſtitution* was Awarded.

CHAP.

CHAP. XIII.

Of Error, and False Judgment.

THE word ERROR, hath a twofold signification: *Error, what.*

And, first, it is taken for *some Fault in a Suit at Law*; which is sometimes in the *Proceedings before Judgment*, and then it makes void the whole Record, and sometimes in the Judgment it self, and then it hath the same Effect: But if it be after Judgment in the Execution, then the Execution is only thereby destroy'd; but the Judgment it self, and all the Proceedings, had before the obtaining thereof, shall stand good, and a New Execution is only to be made out. And where there are two Judgments, as in some Cases there be, there the last may be avoided, and the first stand good. And where the Execution is avoided for such Mistakes, the Party shall have Restitution of that which was taken from him thereby.

And in this Sense it is sometimes in *Matter of Fact*, as where one of the Parties to the Suit is dead when the Judgment is given; and this, if it come to be Tried, is to be Tried by Jury: And so of the like Errors.

Or

Or, it is where any *Diſcontinuance* is in the Suit, or undue Proceeding, appearing by the Record it ſelf.

And this ſometimes is in *Matter of Law*, when it ſhall appear by the Record it ſelf, That the Judgment in the Action was not given according to Law.

And theſe two laſt kind of *Errors*, appearing in the Record it ſelf, are to be tried and determined by the Judges of the ſame, or ſome other Court.

Theſe Errors alſo, are ſome of them in the *Lineal Proceedings* of the Suit; as in the Writ, Count, Plea, Replication, Rejoynder, Surrejoynder, Rebutter, or Surrebutter.

Or, they are in ſome *Collateral Matter* relating to the Suit; as in the Bail, Removal of the Suit, or the like.

Or, it may be in the improper, or undue *Commencement of the Action*, namely, where one Action is brought for another, or in the Form of the Writ, or the like.

Secondly, *Error* is taken for the *Writ of Error* it ſelf, which is the Remedy given to the Party, who ſuffers by the *Error*, for his Relief.

Writ of Error, what. This *Writ of Error*, called in Latin, *Breve de Errore corrigendo*, is thus defined by *Fitzherbert* in his *Natura Brevium*, fo. 20. *A Writ of Error doth lye to Redreſs a Falſe Judgment given in any Court of Record, as in the Common-Bench*, London, *or other City, having Power* (*by the* Kings Charter *or* Preſcription) *to hold Plea of Debt, or Treſpaſs above* 40 s.

In

In what diversity of Cases this Writ lies, see the Statute of 27 *Eliz. cap.* 8. and *Register of Writs Judicial*, fo. 34.

And see the Statute of 3 *Jac.* 1. *cap.* 8. That no Writ of *Execution* shall be stayed by any Writ of *Error* to be brought, until a Recognizance with two Sureties be given in the Court to prosecute it, and to pay the Costs and Damages assessed, if the Judgment be affirmed.

And see the Statute of 21 *Jac.* 1. *cap.* 24. That double Costs shall be paid by him that brings a Writ of *Error* to delay Execution, if it be after Verdict and Judgment in Debt for Tithes, in an Action upon the Case, on a Promise to pay Mony, upon Trover and Conversion, or in Detinue or Trespass.

See also the Statute of 16 & 17 *Car.* 2. *cap.* 8. whereby it is Provided; That in Writs of *Error*, to be brought upon any Judgment after Verdict, in any Writ of *Dower*, or *Ejectione firmæ*, Execution is not to be stayed, unless the Plaintiff in the Writ of *Error* be bound to the Plaintiff in the Action, as the Court shall Order: That if the Judgment be affirmed, or the Writ of *Error* be discontinued by Default of the Plaintiff, or the Plaintiff be Nonsuit in the Writ of *Error*, that they shall pay such Costs and Damages as the Court shall appoint: And the Court may Inquire what special Loss the Plaintiff, in the first Execution, hath by this Delay; and this the Court is to give him by way of Increase of Damages.

But

But this Act is not to Extend to Writs of *Error*, brought by Executors or Administrators, nor any Action Popular, nor other Action brought on a Penal Statute; except Debt, for not setting out of Tithes, nor to any Indictment, Presentment, Inquisition, Information, or Appeal.

In the next place shall be shewn, *How one shall proceed to Reform Erroneous Proceedings against him.*

As namely, If the Judgment be in the Common-Pleas, then it shall be by Writ of *Error* returnable before the Justices of the Kings-Bench, as appears by *Fitzherbert's Nat. Brevium*; upon the Return whereof, after the assignment of the Errors, and not before, he shall have a *Scire facias*, if the Matters assigned be doubtful to the Court, otherwise not.

Scire facias.

But in Error against the King, there shall bo no *Scire facias*.

And Note, That the Record shall not be Entred, till the Parties have a Day by *Scire facias*; and if he assign one Error, he shall have advantage of all other in the Record; except such as be Errors in Fact, which he shall never have advantage of after a *Scire fac*' awarded, and but one Error in Fact may be assigned.

And

And the Form of Assigning of *Errors*, as there appeareth, is to assign them particularly, and not in *omnibus Erratum est*. Form of assigning Error.

And against an Assignment of *Error in Fait*, there *in omnibus Erratum est* is no good Plea.

Where it also appeareth, That if all that Term in which the Record is removed, the Plaintiff in Error doth nothing; or if he assign his Errors, and sue out no Writ of *Scire facias*, retornable the same Term, or the next, all is Discontinued, without a New Writ out of the Chancery — *Quæ coram vobis resid'*. Discontinuance.

And so it is (as it seemeth) by 9 *H.* 6. 13. if the Plaintiff be Nonsuit in a Writ of *Error*. Nonsuit.

And so 3 *H.* 6. 26. if the Writ abate.

But of a Writ of *False Judgment* otherwise, as it seemeth.

And as the same Book 9 *H.* 6. If the Plaintiff in Error do nothing, the Plaintiff, in the first Judgment, upon two *Scire fac'* shall have Execution, or if he be Nonsuit in the first Writ; *quære.*

And by 20 *H.* 6. 18. If upon the *Scire fac'*, then if the Plaintiff be Nonsuit, the Court may award Execution, unless he bring a New Writ of *Error* presently.

And where the Plaintiff is in Execution, there he must assign Error in Person; otherwise by Attorney. By Attorney.

And

Record, not Transcript removed.

And Note, That upon a Writ of *Error* the Record it self is always removed, and not the Transcript.

Original.

But by 24 *Ed.* 3. 24 & 25. the Original Writ is not at first removed, unless the want thereof be assigned.

Fine.

Except upon a Fine, which if the Justices Reverse, they shall send for the Record of the Fine, and avoid it.

In a Franchise.

And so 44 *Ed.* 3. 28. *Bro.* 24. how Error of a Fine *non ritè levat'*, in a Franchise, shall be prosecuted.

In the same Court.

And sometimes Errors shall be redressed in the same Court, as Error in Process in the Kings Bench, because the Default of the Clerks; but not without Writ, tho' the same Term.

But the like may be done the same Term, in the Common-Pleas, without Writ; but in another Term, neither by or without Writ.

Durham.

And it appears by the same Book, That Error in *Durham*, in any Mean Court there, shall be redressed by Writ of *Error* there, before the Bishop himself.

Ireland.

And the like in *Ireland*, in the Kings-Bench there; but Error there, or before the Bishop himself in *Durham*, shall be redressed in the Kings-Bench here.

Palatine.

Wales.

And 19 *H.* 6. 12. Error in County-Palatine, to be redressed here at *Westminster*; and Errors in *Wales*, to be redressed (by Justices Errants there, if there be any, otherwise) in the Kings-Bench here; *quod nota.*

And

And 21 *H.* 7. 33. Error in *Callice* was Redreſſed here, although the Judgment was there, according to the *Civil Law*. *Callice.*

And ſee 24 *H.* 6. 241. and 18 *Eliz. Dyer* 345. How Error in *Cheſter* ſhall be redreſſed. *Cheſter.*

And touching Erroneous Proceedings in *London*, if they be in the *Sheriffs Court*, the Writ ſhall iſſue out of *Chancery*, cauſing the Record to come before the Mayor (be the Judgment upon Writ out of *Chancery*, or upon Plaint only;) and another Writ, that after the removing of the Record, they Award no Execution. *London.* *Superſedeas.*

But if the Plaintiff, in Error there, will not proceed; then a Writ is to be Awarded to the Mayor, to make out Execution.

But if the Erroneous Judgment in *London* be given before the Mayor and Sheriffs, in the *Huſtings*, then to be Reverſed by Commiſſion out of the *Chancery*; upon which the Commiſſioners ſhall Award a Precept, to cauſe the Record to come before them, and to ſummon the Parties. *Huſtings.*

And by the ſame Book, laſt cited, the form of a Writ upon an Erroneous Judgment in an *Aſſize*, be the ſame Adjorned into the *Bench* or otherwiſe, doth appear. *In Aſſiza.*

And where an Erroneous Judgment is given in the *Chancery*, the ſame ſhall be Reverſed in the *Kings-Bench*. *Chancery.*

As 14 *Eliz. Dyer* 315. where a Deed bore Date before the Recognizance, and delivered after.

Inferiour Courts of Record.

And touching Erroneous Proceedings in all other Inferiour Courts of Record, the ſame are to be Reformed by Writ of *Error* out of the *Chancery*, retornable at the Pleaſure of the Party, either in the *Kings-Bench*, or the *Common-Pleas*; and to aſſign Errors, and warn the Parties, as before.

Error in *Chancery* reformed in *C.B.*

And ſee 14 *Eliz. Dyer, ubi ſupra*, That an Erroneous Judgment in the *Chancery*, was Reverſed in the *Common-Pleas*.

Cinque-Ports.

Quære of the Erroneous Proceedings in the *Cinque-Ports*, ——*Ubi Brevia Domini Regis non currunt.* For by the Book 30 *H.* 6. 6. of Debt, againſt a Gaoler of the *Cinque-Ports*, upon an Eſcape; Holden, That an Erroneous Judgment there was Reverſable before the *Conſtable* of *Dover*.

And ſo ſeems the Book of *Diverſity of Courts*, by a Special Writ out of *Chancery*, directed——*Cuſtod' Quinque Portuum*, who ſhall write to the *Barons* for the Record.

Shipway.

And ſo 23 *Eliz. Dyer* 376. at *Shipway*; and, if it be Reverſed, the *Mayor* and *Jurats* to make a Fine, and the *Mayor* to be Depoſed.

Attaint of a Judgment in *Romney*-Marſh. Falſe Judgment.

But 3 & 4 *Eliz. Dyer* 206. an Attaint here of a Falſe Judgment in *Romney-Marſh*.

But if Erroneous Proceedings be in the County-Court, Hundred-Court, or Court-Baron, either in *Plea Real* (as *Droit Patent*) or *Perſonal*, or by *Writ* or *Plaint*, the Writ ſhall iſſue out of *Chancery*: If in the County-Court, then directed to the Sheriff; and if in another Court, then is the Writ an *Accedas*

das ad Curiam to the Sheriff, and ought to be Certified by the *Suitors*; for if no *Suitors*, then no Writ of *False Judgment*.

And Note, That upon a Judgment in a *Real Action* in an Inferiour Court, the Writ of *False Judgment* lieth against the Tenant of the Land, and not against him that is Party to the Judgment. Real Action.

Neither doth it lye for the Defendant in a *Real Action*, until the Demandant hath Entred upon him.

The like, as it seems, in *Personal Actions*, not before Execution. Personal Action.

But in an *Assize* of *Fresh Force*, no Writ of *False Judgment*, but a Writ of *Error*. Fresh-force.

And when all the Record is Certified, as well the Original, as all the Mean Process, then the Plaintiff is to Assign his Errors. And if he proceed not, but be Non-suit, the other shall not have Execution without a *Scire facias*, against the Plaintiff in the Writ of *False Judgment*, who then shall Assign his Errors, and put in Sureties, &c.

And it appears in the said Writ of *False Judgment*, That if the Defendant in that Writ of *False Judgment* make Default after Appearance, a Grand Distress shall be awarded against him. And, if he make Default again, or cannot save his first Default, Judgment shall be given against him, without respect to the Errors, as it seemeth.

And if, upon the Record Returned, the Defendant offer to Aver, That the Record was otherwiſe, it ſhall be Tried by the Country; *quod nota per Stat.* 1 *Ed.* 3.

Error in the *Exchequer.*

And touching Error in the *Exchequer*, none lay at the Common-Law before the Statute of 32 *Ed.* 3. which ſpeaks only of Error in Proceſs; and that they ſhould amend the Rolls, and ſend them into the *Exchequer*, to proceed to Execution; and yet they do Reverſe Judgment, &c.

But by the Book of 15 *Ed.* 4. 18. the Chancellor and Treaſurer cannot proceed to Execution, as the Juſtices of the *Kings-Bench* may do; but muſt Remand the ſame into the *Exchequer* for that purpoſe.

Forma brevis de Errore.

And it appears, 28 *H.* 6. 11. That the Writ of *Error* ought to recite the Judgment to be given *coram Baronibus*, and not *coram Theſaurario & Baronibus.*

Error in C. B.

And of Error in the *Common-Pleas*, the words of the Writ muſt be, *Coram Capital' Juſtic' & Sociis ſuis*; for that is the Form of Entry of the Pleas there.

Error in B. R.

And touching any Erroneous Judgment given in the *Kings-Bench*, ſee the Statute of 27 *Eliz. cap.* 8. How Erroneous Judgments in certain Actions in the *Kings-Bench*, there particularly named, and not touching the King, may be Reformed in the *Exchequer-Chamber*, or in *Parliament*; and if in the *Exchequer-Chamber*, then before the *Juſtices* of the *Common-*

Common-Pleas, and the *Barons* of the Degree of the *Coif*, and the Record to be brought back again into the *Kings-Bench*.

And see the Statute of 31 *Eliz. cap.* 1. of Discontinuance of Writs of *Error* in the *Exchequer* and the *Kings-Bench*, That it shall not be needful for all to be present.

By a Stranger to the Judgment.

And by the Writs of *Error* in the *Register* it appears, That sometimes a Stranger to the Judgment may have his Writ of *Error*, as, Tenant by Reseit, Vouchee, He in the Reversion or Remainder, and the Tenant, both at one time. And if the Feme be Reseived upon the Default of the Husband, both of them may have Error, or False Judgment.

And if Erroneous Execution be awarded upon a Recognizance, the Feoffee may have a Writ of *Error*, as appears 17 *Ass.* 24.

See *Dyer* 4 *H.* 8. 1. accordingly, and that he in the Reversion by the Common Law might have it when his Title accrued; and by the Statute of 9 *R.* 2. presently.

But 21 *Ed.* 4. 27. in Debt against a Sheriff, upon an Escape, he shall have no advantage of Error in the first Record, because he is a Stranger to it.

And so is 9 *Ed.* 4. 3. That a Stranger shall not Falsify, but in that which disproveth the Cause of Action.

But 22 *Ed.* 4. 30. the Vouchee, Tenant by Reseit, Garnishee in Detinue, or Foreign Attachment in *London*, may have these Writs.

Heir, Executor, or Succeſſor.

Then ſhall be conſidered, *Whether the Heir, or Executor, or Succeſſor, ſhall have theſe Writs.*

And firſt, by *Fitzh. Nat. Brev.* touching the Succeſſor, if the Matter touch, and lye in Succeſſion, then the Succeſſor of the Abbot, Parſon, and the like, ſhall have theſe Writs.

But if Judgment in Debt or Damages in an Action Perſonal, be given againſt a Biſhop or a Parſon, his Executor, and not the Succeſſor ſhall have theſe Writs.

And for Debt or Damages recovered, the Adminiſtrator or Executor, and not the Heir ſhall have theſe Writs.

But touching that which the Heir is to have by Diſcent, of that the Heir ſhall have Error, and Falſe Judgment.

The Heir ſhall likewiſe have a Writ of *Error*, to Reverſe an Utlary of Felony or Treaſon againſt his Father; as appears by *Fitzh. Nat. Brevium*; and by that Reaſon the Executor ſhall have a Writ of *Error* to Reverſe an Utlary in Treſpaſs or Debt againſt his Teſtator, becauſe of his Right to the Goods.

And ſo is 11 *H.* 4. 65.

Damages.

But where the Writ of *Error* doth both Entitle the Heir and Executor; as where Judgment in an *Aſſize*, or *Entry ſur Diſſeiſin, &c.* is given againſt one, who dieth; if the *Heir* do not bring *Error* or *Attaint* for the *Principal*, the Executors are remedileſs for the Damages and Coſts recovered.

And

And ſo ſeems the Book of 9 *Ed.* 4. 12. 3 14.

But if the Heir Reverſe the Judgment, he ſhall not (as it ſeems) be reſtored to the Damages; but the Executor, by *Scire facias* upon that Judgment of Reverſal.

Yet if two Jointenants leaſe Land and Damage, the Survivor ſhall be reſtored to the one and the other.

And accordingly 46 *Ed.* 3. 13. the Feme had an Attaint of a Verdict againſt her and her Husband, although the Goods of the Husband ſubject to the Damages.

And ſo 19 *Ed.* 4. 6. the Executor ſhall not have Damages recovered in Detinue of Charters, before the Heir have a *Scire facias* to have the Charters.

And ſee 50 *Ed.* 3. 3. where one in the Remainder in Tail recovered in Waſt, and before Execution died without Iſſue, and his Executor had Execution.

And ſee 11 *H.* 4. 16. That if one of the Siſters after Abatement die, and the Aunt and Niece joyn in *Mortdanceſtor*, the Damages, from the Death of the Aunt Jointenant, and before the Damages for the ſurviving Aunt, to be ſeveral: Where alſo appeareth, That if found for the *Baron* and *Feme*, Plaintiffs in an *Aſſize*, and that the Goods of the Huſband were taken, like Judgment as before ſhall be given.

And 14 *Ed.* 3. *Fitzh. Execution* 15. if three Coparceners recover, and one of them die before Execution, the Damages ſurvive not, except they had once joyned in an *Elegit*.

See more hereof before in the Title *Execution*, and in the Abridgments of *Brook* and *Fitzherbert* under that Title.

What Heir ſhall have theſe Writs.

And by this Reaſon the *Heir to the Land*, and not the *Heir at the Common Law*, ſhall have theſe Writs; as the Heir in *Tail Special*, and *Borough Engliſh*, and the like: For it is not like to a *Condition*, or *Waranty*, as are 9 *H.*7.24. 3 *H.*4.19. and other Books.

Of *Eſtoppels* in aſſigning Error.

Then we ſhall ſee, *What things one ſhall be Eſtopped by or paſt the Advantage, to aſſign Error.*

For which ſee *Fitzh. Nat. Brev.* as followeth, *viz.* That if one Utlawed do purchaſe his Charter of *Pardon*, yet he may have Error to Reverſe the Utlary.

And ſo is 18 *Ed.* 3. But againſt a Diſclaimer, the Tenant ſhall have no Writ of *Error.*

But as there, and 6 *Ed.*3. after Non-tenure found againſt him, he may.

And one Condemned ſhall not aſſign Error in the Proceſs.

Yet he that doth Confeſs the Action, ſhall have a Writ of *Error.*

Entry ſur Diſſeiſin.

And it appeareth there alſo, That if in a Writ of *Entry ſur Diſſeiſin* there want theſe words—*Quod clamat eſſe Jus & Hæreditatem*, if the Tenant plead, he ſhall not have advantage thereof by Error.

And ſo in a Writ of *Detinue* of Charters of Land, and in the Count the Certainty of the Land is not declared; yet thereof is a *quære.*

And

And ſo of the like to this (for which ſee *Brook's Abridgment*, Tit. *Error*, and 25 *H.* 8. *Dyer* 5.) That the Party having Intereſt in the Land by Diſcent, or otherwiſe, ſhall neither have *Error*, or *Attaint*.

What ſhall not be Aſſigned for *Error*.

Some things there be alſo, that one ſhall not Aſſign for *Error*: As,

That the Clerks of their own Heads gave Judgment: Or, That the Jury gave a Verdict contrary to the Judgment; becauſe theſe are Repugnant to that which the Court do as Judges.

Neither, as there appeareth, may many Things be aſſigned for *Error*, that were for the advantage of him that doth Aſſign them: As,

That he made an Attorney; was Eſſoined; had Aid; the View, or the like, when it ought not; or that he had a Day longer than he ought, as appeats in *Bro. Abridg.* Tit. *Error*.

See 14 *Eliz. Dyer* 315. that the Plaintiff ſhall not Aſſign, That he wanted the Judgment——*Ideo in miſericordia*; nor the Defendant——*Quod Capiatur, &c.*

Diminution, what.

And touching *Diminution*; which according to *Fitzh. Nat. Brev.* 25. and *Bulſtr.* 1 Part 43. is, where a Record is Certified in part, but not all of it, ſo that there is ſome Diminution in part thereof, then the Party concerned in it may have a Writ directed to the Court from whence it came, to ſend the whole

See

See the Book of 9 *Ed.* 4. 32. where one of the Errors assigned, *was the want of a Writ of Re-summons:* To which the Defendant did plead, *In nullo Erratum est*, and had a Writ to Certify; and yet upon the Assignment of *Error in fait—In nullo est Erratum* was held no Plea.

And so Note, That after the Plea of—*In nullo est Erratum*, the Defendant had advantage to alledge *Diminution.*

Yet 7 *Ed.* 4. 25. to the contrary.

See 22 *Ed.* 4. 24. touching this Matter.

See also 11 *Ed.* 4. 10. That one shall not alledge Diminution in a thing meer contra to the Record.

And see 15 *Eliz. Dyer* 321. That where Diminution is alledged, a *Certiorari* shall be awarded.

Supersedeas.

And Note, by the Book of 19 *H.* 6. 7 & 8. If after the Writ of *Error* be allowed, the Plaintiff in Error Remove not the Record, the *Judges* of the *Common-Pleas* will award Execution: Or, if he make the Retorn of the Writ of *Error* too long; or, if they think the Errors assign'd to be frivolous.

But the Court of *Kings-Bench* may award a *Supersedeas.*

And by 21 *H.* 6. 26. If one in Prison, upon a Judgment to Account, brings *Error*; yet he shall remain in Prison; *quod nota.*

And it appears 21 *Ed.* 3. *Bro.* 61. That a Writ of *Error* hanging, is no *Supersedeas* to have a *Scire facias* against a Stranger to the Judgment.

And as appears by 28 & 29 *H.* 8. *Dyer* 32. and 18 *Ed.* 4. Debt lieth upon the Judgment, not-

notwithstanding Error, and for the *Costs*, although the Judgment be Reversed.

Error in Parliament.

See 23 *Eliz. Dyer* 375. where, upon a Recovery in *Assize*, Error was brought in the *Kings-Bench*, and the Judgment there affirmed; and a New Writ was brought in Parliament upon that Judgment, and the Lord Chief Justice of the *Kings-Bench*, brought the Record into Parliament, as likewise the Transcript; and after that they were Examined, Remanded the Record; and divers Errors were assigned in the *Kings-Bench*.

Of Amendments of Erroneous Proceedings.

Then touching *Amendment of Errors* escaped in the Proceedings of a Suit, and in what Cases the Judges of the same Court may amend them, and save the bringing of the Writ of *Error*; and where they must be Redressed by Writ of *Error*, and cannot be otherwise done, see 14 *Ed.* 3. *cap.* 6.

And see *Cro.* 2 Part 479, 526, 528, 545, 672. That there are some *Errors* in the Proceedings of Suits, that the *Judges* of the *Courts* wherein they are depending, ought to take Notice of, and Cause them to be amended; as all *apparent Faults* in Proceeding in the Action, as in *False Latin*, *want of Form* in the Writ, *Insufficiency* in an *Office* or *Indictment*, *Mis-awarding* of *Process*, *&c.* As if an *Exigent* go forth where none lieth; *Impossibility* in the *Plea*, as, in *Account*, supposing the Defendant to be the Plaintiff's *Receiver* for Seven years, and he pleads—— *Plene Computavit* (*tali die*,) which is the first Day of the Seven years.

In

In theſe and the like Caſes, the Court is to take notice of it *ex Officio*, to Abate the Writ, award a *Superſedeas* upon ſuch Offices, Indictments, or Proceſs, to ſtay Judgments, if the Defendants Plea be found againſt him, &c. and this without any Exception taken, or motion made by the Party.

The Judges likewiſe are to ſee, that neither Party in a Suit be prejudiced by any Error or Miſtake in the Clerks of the Court, as by writing a Syllable or Letter too little, or too much, or by Razing, Interlining, Adding or Diminiſhing of Words or Letters, in any Record, Proceſs, Warrant of Attorney, Writ, Panel, or Retorn: All which, tho' they appear ſuſpicious to the Court, yet the Judges may amend them.

And ſee *Co. Lib.* 4. 62. *Lib.* 5. 37, 45. *Lib.* 8. 133. *Lib.* 11. 6, 7. *Dyer* 367. and *Stat.* 21 *Jac.* 1. *cap.* 13. That in Caſe of Appeals, and Indictments for Felonies and Utlaries thereupon, and after Demurrer joyned and entred, the ſame Court wherein they are depending, may amend the Imperfections in want of Form, other than ſuch as the Party demurring unto ſhall particularly ſet forth in his Demurrer.

And after a Verdict given in any Cauſe, on either ſide, neither Party in the Suit ſhall be hurt, by reaſon of any Variance in any Matter of Form only, between the parts of the Record, or for lack of an Averment for Life (if the Party be alive, and it be proved by Examination) or by reaſon any *Venire*, *Habeas Corpora*, or *Diſtringas* is awarded to a wrong

wrong Officer, or that the *Viſne* is Miſawarded, or any one of the Jurors Miſnamed in any of the Writs or Retorns, ſo he appear to be the ſame Perſon; or for lack of Entry, or Miſ-entry of the Retorn of thoſe Writs, ſo a Panel be retorned and annexed to them; or for that the Officers Name is not put to the Retorn, ſo the Writ be retorned by him; or that the Plaintiff, being an Infant, doth proſecute in Ejectment, or any Perſonal Action, by Attorney: For the Judges of the Court have Power of themſelves to amend all theſe things.

And ſee *Bridgman's Reports* 70. *Bulſtr.* 1 Part 178. *Brownlow's Rep.* 30, 35, 57, 80, 130, 135, 144, 149, 151. *Co. Lib.* 1. 76. *Lib.* 2. 57, 77. *Lib.* 5. 38, 144. *Stat.* 23 *Eliz. cap.* 3. and *Stat.* 27 *Eliz. cap.* 9. By all which it appears, that moſt Miſtakes in Fines and Common Recoveries are not fatal, but may be amended.

But by *More*, *Caſe* 332. the Juſtices may not Reform *Error in Law* before themſelves, though it be the ſame Term; but *Error in Fact*, or *Proceſs*, they may.

So, by *Dyer* 195, 196. an Utlary in the *Kings-Bench* was Reverſed by Error in the ſame Court; but that was for *Error in Fact*, *not in Law*, as if no Utlary in the Caſe.

And *Trin.* 26 *Car.* 2. in *B.R.* it was holden, That the Clerk in the *Kings-Bench* may amend the Roll, until a *Recordatur* be made thereof, either upon Writ of *Error*, or by Rule of Court.

And

And ſee *Mich.* 8 *Jac.* 1. in *C.B. Co. Lib.* 8. fo. 156. where ſaid, That before the Statute of 8 *H.* 6. *cap.* 12. no Original might be amended in the *Common-Pleas*; and this Statute enables that Court to amend only *Miſpriſions*, namely, when the Clerk miſtakes one word for another, or where he writes Words which are not Latin: As,

9 *H.* 7. 16. *hos breve*, for *hoc breve*; or *Bendloe's Rep.* fo. 19. *Imaginavit* for *Imaginatus fuit*; or by Miſtaking the Words of an Original, to ſay, *Oſtenſ. quare non fuit*, for *fuerit.*

Or, as 22 *Ed.* 4. Miſtaking the words of Form, namely, *Præcipe quod ſolvat*, for *Præcipe quod reddat.* In all theſe Caſes there ſhall be no Amendment.

But *Mich.* 9 *Jac.* 1. in *C. B.* in *Ejectione firmæ*, *Weeks* againſt *Blackſtead*, Leſſee of *Camden*; where, after Verdict to ſtay Judgment, the Defendants Council Objected, that there were two Errors in the Record, one in the Declaration, namely, *prout prædictus Willielmus*, for *prædictus Johannes*; and the other was in the Iſſue, *viz. Et de hoc ponit ſe* (meaning the Defendant) *ſuper Patriam, Et prædictus Willielmus* (the Defendant again, for *Johannes* the Plaintiff) *ſimiliter.*

Per Cur', theſe are but Miſpriſions of the Clerk, and not Errors, and ſhall be amended, being like to the Miſtake in 10 *H.* 7. 23. and 11 *H.* 7. 2. where *Defendens* was written for *Querens*, and *Johannes* for *Rogerus*, and amended by the Advice of all the Juſtices.

And

And by *Coke* Chief Justice, *Misprisions* were amendable the same Term at the Common Law; because, during the Term, the Record is said to be *in pectore Judicis*, and not esteemed to be on the Roll so absolutely, but that they may amend the same at their Discretions.

But the Justices of the *Common-Pleas*, after a Writ of *Error*, cannot at all amend the Roll, where a Judgment was given the same Term, and is mistaken in the Entry, because the Roll is not a Record of that Term.

And by 5 *Ed.* 3. this was so at the Common Law, until the Statute of 14 *Ed.* 3 gave power to amend *Misprisions* in another Term.

But 46 *Ed.* 3. the Case was, that *Defendens* was mistaken for *Querens*; but could not be amended, because an Old Roll; and the Statute gives Power only to amend New Rolls of the same Term they are Entred.

By the Statute of 26 *H.* 8. the Justices of the *Common-Pleas*, have Power to amend a *Plea-Roll*, in *Misprision* only; but not *Omissions*.

Misprisions are *Vicia Scriptoris*, *Faults of the Clerk*; as the Declaration varying from the Writ, or the Roll from the Original, or the Mean or Judicial Process; these by 19 *H.* 6. shall be amended, if it be only in default of the Clerk.

But if in a Plea, that be Omitted which should be Averred, this shall not be amended, because it ought to have been part of the Plea, Errors not amendable.

Plea, and cannot be ſaid to be any Default of the Clerk; but a meer Omiſſion, which makes the Plea imperfect.

So, *Mich.* 5 & 6 *Mar. Dyer* 164. a Record came out of Ancient Demeſn *in Banco*, by Writ of *Falſe Judgment*, and the Writ was ——*Sub ſigillo ſuo & ſigillis quatuor legalium hominum ejuſdem Curiæ*; which according to *Fitzh. Nat. Brev.* fo. 18. *b.* ought to have been ———*per quatuor legales homines, &c.* upon which the Court doubted, if it might be amended; but ſeemed to be of Opinion, That the Plaintiff might have a New Writ to the Juſtices of the *Common-Pleas*, to Authorize them, to proceed to diſcuſs the Errors in the Record, which lay before them.

So, 2 *Mar. Dyer* 105. a Common Recovery was ſuffered to Bar the Iſſue in Tail; and the Warrant of Attorney was, That ——*Alicia po. lo. ſuo*, for *Elizabetha*; alſo the Writ of *Error* was ———*de loquela quæ fuit in Cur' noſtra coram Juſtic' noſtris per breve noſtrum*——— It was a *Quære*, if it were amendable; but Reſolved in *Blackmores* Caſe, *Co. Lib.* 8. fo. 152. *quod vide, & nota.*

And ſee *Brownl. Rep.* 2 Part, fo. 300. where a Writ of *Error* was brought by *Frances Fulgham* againſt Sergeant *Harris*, in this manner——*Præcipe, &c. quod, &c. Franciſcæ Fulgham, Viduæ*, contrary to the Form of the Regiſter, which is——*quæ fuit Uxor*, and not *Widow*; and the ſubſequent words were ———*rationabilem dotem Tenementorum quæ fuerunt* Franciſci Fulgham *quondam viri ſui. Per Cur'*, this is Error; for tho' it varies not in

in ſubſtance; yet becauſe it is contrary to the Form of the Regiſter, it ſhall not be amended.

So *Cro's Jacobi* 21 *Merrel's* Caſe, in a Writ of *Error*, of a Judgment in the *Common-Pleas* in Ejectment, it was aſſigned for Error, That the Plaintiff declared, that *J. S.* 25 *Martii, Anno ſexto Jacobi*, had demiſed to him for Seven years, by virtue whereof he Entred, and was thereof poſſeſſed, until the Defendant, *poſtea ſcilicet Anno ſexto*, did ouſt him.

After Imparlance, the Plaintiff made a Second Declaration, wherein he ſuppoſed the Ejectment to be done 26 *Maii Anno ſupradicto*, and of this Ejectment the Writ was brought; it was found againſt the Defendant, and Judgment for the Plaintiff, and whether it was Erroneous, becauſe no day was mentioned in the firſt Declaration, was the Queſtion.

Agreed, That the firſt Declaration is the Principal, and if any Matter of Subſtance be omitted in it, it cannot be helped or amended by the ſecond, for that is but a meer Recital; and therefore if the firſt be not good, the Trial is Erroneous.

But *per Cur'* the firſt Declaration was good, for the Demiſe is laid to be 25 *Martii, ſexto Jacobi*, which is the firſt Day of the year, and the *poſtea ſcilicet* 6 *Jacobi*, that the Defendant Ejected him is certain enough; for the Year when the Ejectment was made, and the Day of the Ejectment, are not material, being before the Action brought.

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Of Error in Fines and Common Recoveries.

Then, *Of Errors in Fines upon Writs of* Covenant, *and Common Recoveries upon Writs of* Entry in the Poſt.

For which ſee, firſt, *Brownl. Rep.* 2 Part, fo. 300. where, upon a Fine the firſt Proclamation was made in *Trinity* Term 5 *Jac.* the ſecond in *Michaelmaſs* Term, 5 *Jacobi*, the third in *Hillary* Term 6 *Jacobi*, when it ſhould have been *Hill.* 5 *Jacobi*, and the fourth and fifth Proclamations were in *Eaſter* Term 6 *Jacobi.*

Per Cur', This is palpable Error; for the fourth Proclamation was not entred at all, and the fifth was entred as of *Hillary* Term 6 *Jacobi*, when it ſhould have been of *Hillary* Term 5 *Jacobi*, and ſo cannot be amended, becauſe it was of another Term.

And ſee *Cro's Jac.* 77. Earl of *Bedford's* Caſe; where, in a Writ of *Error* to Reverſe a Fine, it was aſſigned for Error, that the Writ was——*Præcipe, &c. quod teneat, &c. Conventionem, &c. de octo Meſuagiis, duobus Toftis, decem Gardinis*; and it was Certified, *de octo Meſuagiis, decem Gardinis, &c.* and Adjudged no Error.

But ſee *Cro's Caroli*, fo. 300. *Done* and *Smithy's* Caſe; where a Writ of *Error* was brought to Reverſe a Fine levied by *Baron* and *Feme*, and others; and the Writ of *Covenant* wat directed to the Coroners, with this Clauſe——*fiat Executio brevis prædict' per Coronatores, ita quod Vic' ſe non intromitteret*, becauſe the Sheriff was one of the Cognizees; and this was Objected for Error; becauſe,

becauſe, as there ſaid, if the Sheriff had been ſole party to the Fine; yet the Writ ought to have been directed to him, becauſe but a Summons, for the Sheriff may ſummon himſelf.

But Reſolved to be Error, becauſe a Doubt in Law, if the Sheriff, as Plaintiff, may Execute a Writ upon himſelf; and therefore the general Courſe is, to direct the Writ to the Coroners, to avoid ſuch Doubt.

And ſee *Co. Lib.* 5. fo. 38. *Tey*'s Caſe, where *A.* and *B.* his Wife levied a Fine of divers Mannors, Lands and Tenements to *J. S.* and *J. D.* in ſeveral Towns in the County of *E.* in which divers Grants and Renders were made; and in the third Render, all the Mannors, Lands and Tenements were rendred to *A.* and *B.* and the Heirs of the Body of *A.* and in the fourth Render, part of the Premiſſes were rendred to *B.* in Tail, the Remainder to the Right Heirs of *A.*

It was Reſolved, that the ſame was not Error;

Firſt, That the fourth Render, as to that was contained in the third Render, ſhould be in the quality of a Charter, which needs not ſuch a preciſe Form as a Judgment.

Secondly, That the Conuſor ſhould not aſſign that for Error, becauſe he gets an Eſtate by it; and no man ſhall reverſe any thing for Error, unleſs he can ſhew that the Error is to his advantage.

So *More*, *Caſe* 202. If an Infant levy a Fine, and take an Eſtate by Render, he may not have Error for this. Infant.

And ſee *Mich.* 31 *Eliz.* in *B. R. Leon. Rep* 1 Part 317. *Pigot* and *Harrington*'s Caſe, where *Baron* and *Feme* were Tenants for Life, the Remainder in Fee to an Infant, and they three levied a Fine, and the Infant only brought Error to Reverſe it.

It was Objected, that they all Three ought to joyn in the Writ, according to 29 *Ed.* 3. 14.

But *per Cur'*, the Writ is well brought, for the Error is not Aſſigned in the Record; but, without it, in the perſon of the Infant, and that is the Cauſe of Action for him, and for no other; and the Fine was reverſed, as to the Infant only.

Vide Cro's *Jacobi* 330. *Point*'s Caſe, and *Bulſtrode*'s 1 Part 206. *Batts* and *Jenning*'s Caſe; where Inſpection of an Infant in Error, to Reverſe a Fine upon the day of Adjornment of the Term, held good by all the Judges of *England*.

And ſee *Mo. Caſe* 701. That a Writ of *Covenant*, Retornable before the Date, is Error.

CHAP.

CHAP. XIV.

Of Appeals, Indictments, and Informations.

APPEAL, according to *Co.* on *Littleton, Lib.* 2. *cap.* 11. comes, from the Latin word *Appello, to Call*; *quia Appellans vocat Reum in Judicium*, and is uſed in our Law, *for the private Accuſation of a Murderer, by a Perſon who had Intereſt in the Party murdered.* *Appeal*, what?

It is as much as *Accuſatio* with the *Civilians*; for, as in their Law, Cognizance of Criminal Cauſes, is taken either upon *Inquiſition*, *Denunciation*, or *Accuſation*, ſo it is in ours upon *Indictment* or *Appeal*. *Indictment* comprehending both *Inquiſition* and *Denunciation*. *Accuſation*, or *Appeal*, being *a lawful Declaration of another man's Crime* (of Felony at leaſt; for tho' there be an *Appeal* of *Maybem*, yet that, according to *Bracton*, is but in a manner an *Action of Treſpaſs*) *before a Competent Judge, by one who ſets his Name to the Declaration, and undertakes to prove it, upon the Penalty that may enſue of the contrary.*

Appeal, by others, is defined to be, *The violent purſuing of a Subject unto Death*; and is the moſt nice kind of Suit that is commenced at the Common Law, for every ſmall matter will quaſh the ſame, if it be

not freſhly purſued; and ſhall in divers reſpects be taken ſtrictly *in favorem vitæ.*

And Note, That the Proceſs in every *Appeal*, is to bear Date the ſame day of the Retorn, and if not, it will be a Diſcontinuance of the Proceſs.

Note alſo, That the Omiſſion of any word, which is material, in the Writ of *Appeal*, will abate the ſame.

And it is to be Obſerved, That the Proceſs in an *Appeal*, doth vary from all other Proceedings at the Common Law; for there ſhall be no Amendment of a Writ of *Appeal*, nor is the Diſcontinuance of it helped by any Statute.

Where the Heir ſhall not have an Appeal of Murder.

Then, *Where an Appeal of Murder will not lie for the Heir.*

For which ſee *Mich.* 33 *H.* 8. *Dyer* 50.

The Statute of 31 *H.* 8. made it Treaſon for a Woman to Poiſon her Husband. A Woman Poiſoned her Husband: Afterwards the Statute of 32 *H.* 8. *Of General Pardon*, pardoned the Offence; the Heir brought an *Appeal of Murder:* And it was the Opinion of all the Juſtices, that now an *Appeal of Murder* did lye for the Heir; for that now Murder was turned into Treaſon, and the greater Offence ſhall extinguiſh the leſſer.

And ſee *Co. Lib.* 6. fo. 13. in the Caſe of Pardons acc. and 7 *Eliz. Dyer* 235. where Petty Treaſon is pardoned by a General Pardon, there one who killed his Maſter

was

was Indicted of Murder, and holden, the Indictment did not lye againſt him; but being found Guilty, was Reprieved.

And ſee *Mich.* 33 *H.* 8. *Dyer* 51. and 33 *Eliz. Co. Lib.* 4. 45. where an Appeal of Murder was brought againſt *W.* to Anſwer to *A. B. alias dict'* A. B. *Fratri & hæredi'* of the Perſon murthered; but becauſe the Plaintiff in the Appeal was named Brother and Heir in the *Alias dictus*, which is no part of the Name, the Appeal did Abate, and the Defendant diſcharged by the Court.

And ſee 5 *Ed.* 6. *Dyer* 69. where there were three Brothers, and the Middle Brother is killed, and the Eldeſt Brother dies within the Year, without bringing any Appeal, and the Queſtion was, If the Younger Brother might maintain an Appeal? It was not Reſolved, but left a *Quære.*

See 11 *Ed.* 4. 11. *Stamf.* 59. 20 *H.* 6. 43. by *Forteſcue*, that he ſhall not; but 16 *H.* 7. 15. *contra.*

Then, *How Appeals ſhall be brought by Infants.* Appeals brought by Infants.

Firſt, See *Paſch.* 17 *Ed.* 4. *Pl.* 4. and *More*, *Caſe* 646. where an Appeal was brought by an Infant, and the Defendant prayed to be diſmiſſed, becauſe the Plaintiff was an Infant.

Per Cur', If the Defendant be guilty, he ſhall ſtay in Ward till the Infant comes of Age.

But by 27 *H.* 8. 1. *b.* the Plaintiff now ſhall appear by Guardian.

By *Co.* 2 *Inſt.* 5. If an Infant bring an *Appeal* of the Death of his Anceſtor, the Parol ſhall not demur for want of Battail, but the Infant ſhall be outed of it, as if the Appellor were Old, or Maimed.

But *Mirror of Juſtices* 127. *contra*, the Parol ſhall demur.

And ſee 2 *Ed.* 4. 19. *b.* and 20. *a.* acc. and 11 *H.* 4. 93. *a.*

And *Paſch.* 27 *H.* 8. 25. an Infant brought an *Appeal of Murder* in the time of *H.* 8. and prayed, that the Parol might demur; and Reſolved it ſhould not.

By 35 *H.* 6. 10. If an Infant be found guilty of Felony, 'tis in the diſcretion of the Court to give Judgment or not, as they find the Infant hath Diſcretion, or Malicious Intent.

Of pleading to Appeals.

By *Owen* 59, 63. and *Popham* 115. in an *Appeal of Murder*, after Pleading to the Writ, the Defendant muſt Plead over to the Felony, elſe it is a Confeſſion of it, for there his Life is in queſtion.

And ſee 3 *Cro.* 223, 224. where in an Appeal of the Death of an Husband, the Defendant pleads—*Ne unques accouple, &c.* and *quoad, &c.* Not Guilty. The Plaintiff Replies,—*fuerent accouple*, but pleads nothing to the reſt; yet it ſeems the Plea is not Diſcontinued, becauſe the firſt Plea is not Triable at Common Law, ſo anſwers not the Plea over.

See 1 *Cro.* 247. *Southby* and *Price's* Caſe, An *Appeal of Murder* was brought in *A.* being the next County to *B.* where the Murder was done, the Writ ſhall abate: For by 25 *H.* 8. *cap.* 6. Indictments may be in Counties next adjoyning; but not Appeals.

By *Yelverton* 204. *Bradley* and *Bank's* Caſe, and 2 *Cro.* 283. Diſcontinuance of Proceſs in an *Appeal* is not aided by Appearance afterwards.

And by *Yelverton*, *ibid.* Conviction with Clergy is a good Bar in *Appeal.*

And *Idem* 205. *Non Culpabilis ad Murdrum & Feloniam prædict'*, is a good Bar in an *Appeal of Manſlaughter.*

See *Dyer* 348, 349. where *A.* Appeals one as *Acceſſary* to *B. C.* of *D.* in the County of *E.* who pleads *Nulla talis perſona in rerum natura*, as B. C. *die impetrationis brevis*, *nec unquam poſtea:* 'Tis good tho' there be one named *B. C.* in another County.

And ſo it is, if he were dead the Day of the Writ brought.

But 26 *H.* 6. 8. *A.* brings an Appeal, and the Defendant pleads, *Nulla talis perſona in rerum Natura die impetrationis brevis.* It ſeems not to be a good Plea, for he ſhould have pleaded, *Quod Quer' obiit ante diem impetrationis brevis*; or, *Nulla talis perſona unquam fuit in rerum Natura.*

By *Keilway* 106, 107. the Court will not ſuffer the Defendant to plead Variance between the *Appeal* and the *Indictment*, and to Conclude to the Felony.

Vide

Vide eundem ibid. What Pleas are Peremptory in Appeals.

By *Co. Lib.* 3. fo. 30. If a Stroke be ſtruck in one County, and the Party die in another County, an *Appeal of Murther* may be brought in either of the Counties, although nothing be done in that County where he died, towards his Death.

By *Co. Lib.* 4. fo. 47. one Appeal of Murder muſt be brought againſt all the Parties, Principals and Acceſſories, and not ſeveral Appeals; and the Declaration muſt be againſt them all; for the Wife brought an Appeal of Murder of her Husband againſt divers, and afterwards brought another Appeal againſt others.

Reſolved by the whole Court,

That all the ſaid Appeals, but the firſt, ſhould abate.

That ſhe ought to have one Appeal againſt them all.

That ſhe cannot have two Appeals of Death, but ought to joyn all in one Writ.

That if one brings an Appeal of Death againſt divers, and all but one makes Default; yet the Plaintiff muſt declare againſt them all.

But by *Keilway* 83. In Murder an *Appeal* ſhall be firſt brought againſt the Principal, and after that, another againſt the Abettor.

So

So *per eundem ibid.* an Appeal of Robbery ſhall be firſt brought againſt the Principal, and then againſt the Acceſſory.

An Acceſſory ſhall be diſcharged, where the Principal before Judgment obtains his Pardon; as appears by *Co. Lib.* 4. fo 43. where the Brother and Heir brought an Appeal of Murder againſt *A. B.* as Principal, and *C. D.* as Acceſſory of the Death of his his Brother.

The Principal pleaded, *Not Guilty*; but was found Guilty of Manſlaughter, and had his Clergy.

It was Reſolved in this Caſe,

1. That the Acceſſory was diſcharged, becauſe he could not be guilty before the Fact, in caſe of Manſlaughter.
2. Although the Principal was Convicted, yet, foraſmuch as he had his Clergy before Judgment, the Acceſſory ſhall be diſcharged.

So, where the Principal upon his Arraignment confeſſeth the Felony, and before Judgment obtains his Pardon, the Acceſſory is thereby diſcharged.

Vide Cro. Car. 382, 383. where an Appeal was brought againſt two, one for Petty-Treaſon, the other for Felony: The Defendants pleaded Not Guilty the ſame Term in which the Appeal was Arraigned, and therefore there was no other Declaration filed: But if they had pleaded a Plea which was adjorned to another Term, or had not pleaded that

that Term, then it ought to have been filed.

And it was then agreed by the Court,

That the Plaintiff might take out one or ſeveral Writs of *Venire facias*, for doubt of Challenge.

And ſee *Co. Lib.* 4. fo. 45. That *Auterfoits* Indicted of Manſlaughter, and thereof Convicted, and Clergy allowed, was a good Bar in Appeal of Murder.

But *contra*, if the Indictment be inſufficient.

And ſee 6 *Ed.6. Dyer* 88. where an Appeal is brought by a Woman, of the Death of her Husband: To which the Defendant pleaded Not Guilty, and afterwards the Plaintiff took another Husband; and it was Adjudged, that the Appeal was determined by her Intermarriage.

See 3 *H.*7.5. where in an Appeal of Death one Challenged above 35, and had Judgment of *Pein fort & dure*, that is, *was Preſt to Death.*

So 21 *Ed.* 3. 18. *Bro.* Tit. *Corone, Pl.* 43. fo. 181. where one againſt whom an Appeal of Robbery was brought, did ſtand Mute out of Malice; and it was found by the Jury that he could Speak; whereupon he was preſently Condemned to be Hanged, and the Appellor had his Goods: But if it had been by Indictment at the King's Suit, he ſhould have had Judgment of *Pein fort & dure.*

Laſtly,

Laſtly, by *Co.* 3 *Inſt.* 212. If the Defendant in an Appeal be Vanquiſhed or Slain, the Judgment is the ſame, that is, *Suſpendere per Collum.*

And thus much ſhall ſuffice of *Appeals.*

In the next place, *We ſhall ſay ſomething of Indictments, and the Pleadings thereupon, and what will Maintain or Quaſh the ſame.*

An *Indictment* is an *Accuſation*, drawn and ingroſſed in Form of Law, in the nature of a Bill (or Declaration) againſt one for ſome Offence, Criminal or Penal, and preſented to the Grand Jury to be Inquired of, who, in caſe they Find the ſame, do write *Billa vera* upon it; but otherwiſe do Indorſe the word *Ignoramus* thereupon. *Indictment*, what?

An *Indictment* is always at the Suit of the King, ſo that he who Prefers it, is no way tied to the Proof of it upon any Penalty, except there appear Conſpiracy. It ought to be drawn with the greateſt Exactneſs, Curioſity and Certainty; and the Day, Year and Place muſt be ſure not to be omitted.

Indictments are called *Pleas of the Crown*, and are exhibited for Treaſon, Felony, Miſpriſions of Treaſon, High Miſdemeanors againſt the Common-Weal, and all other Crimes which touch the Life, or Mutilation of a Man; and theſe cannot be Proſecuted in the Name of any one but the King, becauſe he only can Pardon them, as Offences committed againſt his Crown and Dignity.

By

By *Co.* 3 *Inſt.* 106, 107. If any of the Grand Jury diſcover what perſons are Indicted of Felony or Treaſon, they are guilty of high Miſdemeanour, and ſhall be Fined and Impriſoned, for thereby the parties Indicted may Eſcape.

Vide Co. 3 *Inſt.* 230. and 4 *Rep. Sier's Caſe*, where ſaid, That it is not neceſſary for the Coroner to ſet down the Day preciſely in his Inquiſition of Felony or Murder; for if it be alledged to be a day before, or after the Fact done, the Jury ought to find the party Guilty, and alſo find the Day when it was done, and the Attainder ſhall relate to the Day found in the Verdict: And if he be found Guilty thereupon, he may plead *Auterfoits acquitte.*

But if they find him Guilty generally, his Feoffee or Leſſee may falſify the time, if alledged before it was done to their prejudice.

By *Co.* 4 *Rep.* 46, 47. *Wrote* and *Wigg*'s Caſe, an Inquiſition was taken before the Coroners of the Sejeantry and of the County, concerning a Death, &c. at *D.* within the Verge, and, by him that pleaded a Conviction in Bar thereupon, averr'd to be Indented; but, it not appearing to be ſo by the Inquiſition it ſelf, it ſhall be intended otherwiſe, and ſo the Inquiſition inſufficient, and the Conviction thereupon void, and no Bar.

Vide

Vide Dyer 323. *a.* 323. *b.* where an Indictment was brought againſt divers for ſaying, and hearing of Maſs, and every one was Fined one hundred Marks upon the Statute of 1 *Eliz.* where ſaid, That the word *Miniſter* includes *Prieſt*, and *Clerk* is ſufficient to prove one a *Prieſt*. And where one is Convicted of three Offences upon three Indictments at one time, he ſhall be Fined only for the firſt.

And by *Popham*, in his *Rep.* fo. 93. In Indictments of *Jeſuits* upon the Statute of 27 *Eliz.* for coming into *England*, mention muſt be made, that he was born within the Kingdom of *England*, and that he is a *Jeſuit*; but need not ſhew where he was made a *Jeſuit*.

Vide Stile's Rep. 245, 312, 324, 350. That an Indictment or Information brought againſt Two, or more, for ſpeaking Words, &c. may be good; but in Caſes of Felony a joynt Indictment againſt them is not good.

By *Cro.* 2 *Part* 479. the Court is to take notice *ex Officio*, of all apparent Faults, as Inſufficiency in Indictments, and to award *Superſedeas* thereupon, if it be found againſt the party Indicted, without any Exception taken by him thereunto.

And by *Dyer* 367. *Co.* 11. *Rep.* 6. in Caſe of Indictments and Outlawries thereupon, the Court may amend all Imperfections therein, as to want of Form.

But

But by *Stile's Rep.* 437. a Caption of an Indictment of a former Term, cannot be amended in another Term; but the ſame Term it may.

What ſhall Quaſh an Indictment; what not.

Then, *What ſhall be ſufficient Cauſes to quaſh Indictments, and what ſhall not.*

See, firſt, *Dyer* 50. *b. Co.* 4. *Rep.* 41. *a.* 44. *b.* 47, *a.* 3 *Cro.* 739. One ſtrikes a man in *March*, who died thereof 15 *April*, and the Indictment concludes, that he killed him in *March*: 'Tis not good; but that he killed him upon the 15*th* of *April* is. But the beſt way is to Conclude generally, and ſay, he killed him, without naming the day.

And Note, That in an Indictment of Murder, the word *Murdravit* ſupplies *ex Malitia præcogitata*; and ſo doth *Furatus fuit*, *Felonice cepit.*

But where an Indictment was, That *A.* aſſaulted *B.* at *C.* & *ipſum Murdravit*, without ſaying, *adtunc & ibidem*, it was holden to be ill, for want of naming the Place; for the Aſſault and Murder are ſeveral things, and may be done at ſeveral places.

So, an Inquiſition taken by a Coroner in this Form——*Berk* ſſ. *Inquiſitio capt' primo die Maii*, without ſaying where, was Adjudged to be ill.

So, by *Co.* 3 *Inſt.* 135. if one be Indicted for Poiſoning another with *Rats-bane*, and it be proved, that he was Poiſoned with *Cantharides*, it doth well maintain the Indictment,

ment, becauſe Poiſon is the ſubſtance of them both; but killing by Weapon, or otherwiſe, will not maintain ſuch Indictment.

But if the Indictment be for killing with a Sword, Dagger, or other Weapon, it will maintain the Indictment, becauſe 'tis killing under the ſame Clauſes, by Weapons.

See *Dyer* 99, *a.* 285, *a.* 370, *a.* where holden, That an Indictment *de Morte*, or for ſtealing the Goods, *Cujuſdam ignoti* is good; for the party ſlain, or robbed, may not be known.

So, *Stile's Rep.* 124. an Indictment for Aſſaulting one *John* of the Pariſh of *A.* omitting his Surname, holden to be good, as well as of Killing *quendam ignotum*; and if he ſhould be Indicted again, under the whole Name, he may help himſelf by *Averment.*

But by *Cro.* 2 Part 606. an Indictment for Striking in the Church-yard, was quaſhed, becauſe it was——*Ad Generalem Seſſionem Pacis tent' apud* B. not mentioning the County; for tho' the County were in the Margin, and ſo may be intended that County; yet *Indictments* ſhall not be taken by *Intendment.*

Yet by *Cro.* 3 Part 108, an Indictment was of a *Riot*, That he *coram* A. & B. *Juſtic' Domini Regis, &c.* and Exception was taken to it, that it ſhould have been, *coram* A. & B. *duobus Juſtic', &c.* But Reſolved by the Court, That falſe Latin ſhall not *quaſh* an *Indictment* where the *Intendment* is evident.

But ſee *Stile's Rep.* 155. and *Cro.* 3 Part 331. *contra.*

And ſee *Cro.* 3 Part 137. an Indictment of Murder ——*quod in Brachia ſua dextra percuſſit* —— held to be ſenſleſs and uncertain.

And ſo, to ſay—*inſtanti die obiit*, without the word *Ibidem*, or naming the Place where, is as *ill*.

So, by *Co.* 3. 194. an Indictment for *Murder*, on the Coroners Inqueſt, being ——*quod percuſſit eum gladio*, not ſaying *Felonice*, was quaſhed for that Reaſon.

So *Idem ibid.* 583. an Indictment——*quod felonice & burglariter fregit domum*, was held to be no good Indictment for Burglary, becauſe it wanted the word *Noctanter*.

But by *Gawdy* Juſtice, 'tis good for the Felony; yet becauſe the Addition was in the *Alias dictus*, and not in *Primo nomine*, it was quaſhed as to both.

And *Id. ibid.* 920. an Indictment of Burglary was——*quod Burglarit fregit*, and *Exception* taken to it, becauſe not ſaid *Burglariter*; but Reſolved to be good.

Yet *Co. Rep.* 4. 39, *b. Burglarit* for *Burglariter*, was Adjudged ill.

So, in *Ryley's* Caſe, *Murderaverunt* for *Murdraverunt*, held not good.

So, *Idem*, *ibid.* and *Dyer* 261, *a.* 304, *b. Felonice & ex Malicia ſua præcogitata fregit*, will not ſerve inſtead of the word *Murdravit*; for *vocabula Artis* are not to be ſupplied by words that *tantamount*.

And

And by *Stile's Rep.* 12. the like Law is in Caſes of *Rape.*

So, by *Cro.* 2 *Part* fo. 20. an Indictment ſhall be taken ſtrictly, not by Intendment; and therefore to ſay, *quod Rapuit Fœminam,* without ſaying *Felonice,* was held ill.

See a Notable Caſe in *Co.* 5 *Rep.* fo. 120, 121, 122. where an Indictment was upon the Coroner's Inqueſt for Murder, and Exceptions taken to it:

Firſt, Becauſe 'tis *ſuper Mammillam in anterior' parte Corporis*; and *Mamilla* is ſpelt with a double *m*, and ſo falſe Latin: But Reſolved, falſe Latin ſhall not quaſh an Indictment, tho' it will an Original; but an Inſenſible word, in a Material place, may. Alſo *ſuper Mammillam* is but a Redundancy, for *ſuper anteriori parte Corporis,* intending the Trunk, was certain enough. But *ſuper Caput, ſuper Faciem, in dextra parte Corporis, in ſiniſtra parte Corporis, ſuper ſiniſtram* or *dextram Manum, Brachium, Latus, &c.* without addition, is not.

Secondly, 'Tis *Dans unum vulnus*, for *unam plagam*; but that was Ruled, well enough.

Thirdly, The length, breadth and depth of the Wound was not ſhewed, but becauſe it was ſhewed, that he was ſhot through with a Piſtol, that was certain enough; for they are but ſet forth to ſhew the Mortality.

Fourthly, 'Twas ſaid *Dans unum vulnus totaliter penetrans, &c.* and thereto Objected, That it was not the Wound, but the *Total* did penetrate; but that was Ruled to be well enough, for the Wound went through.

Fifthly, There wanted the word *Percuſſit*, for it was *dans unum vulnus* without the word *Percuſſit*; and for that, tho' it was ſhooting with a Piſtol, the *Indictment* was quaſhed as Inſufficient.

And ſee *Cro.* 1 *Part* 334. an Indictment againſt Two, for ſtriking in a Church, where the Grand Jury found *Billa vera* as to one, and *Ignoramus* for the other; and Exceptions taken to it,

Firſt, Becauſe the Bill is laid joyntly—*quod fecerunt, ſed non allocatur*; for that is but falſe Latin, which of it ſelf ſhall not quaſh an *Indictment*.

Secondly, The Bill is—*contra formam Statuti*, and yet it doth not appear by the Indictment, that the ſtriking was with a Weapon, and that lies not within the firſt Clauſe of the Statute, and the ſecond Clauſe gives only Excommunication to the Offender *ipſo facto*; and *contra formam Statut'*, cannot ſtand in an Indictment of *Battery* at Common Law.

So *Leon. Rep.* 2 *Part*, 183, 184. an Indictment was upon the Statute of 5 *Ed.* 6. 4. for Drawing in the Church upon one *A. B.* without ſaying, That he did it with an Intent to Stab him, and for that Cauſe holden to be ill; and moreover, for that it Concluded——*contra formam Statut'*, it did not appear to be like to an Indictment at Common Law.

See *Cro.* 697. *acc.*

And

And ſee *Noy's Rep.* 171, 172, 173. an Indictment for ſtriking one in the Church-yard, quaſhed upon two Exceptions:

Firſt, Becauſe it is laid ——*quod extraxit Gladium & percuſſit*, inſtead of *Extraxit Gladium ad percutiend'*, according to the words of the Statute, which are——*If any perſon maliciouſly Strike in the Church-yard, or Draw any Weapon there with an Intent to Strike, &c.*

Secondly, Becauſe the word *Malitioſe* was omitted in the Indictment, which is a Material Error, becauſe expreſly named in the Statute.

Then, *For Indictments of Nuſances*, take theſe Rules: Nuſances.

See *Cro.* 3 *Part* 63. where an Indictment againſt one, for making a Nuſance in the *Horſe-way*, was quaſhed, becauſe it was not ſaid the *Kings-way*, or the *High-way*.

And Note, by 22 *Aſſ.* an Indictment doth not lye for a Nuſance done to a partilar Place; for it muſt be laid, to be done to all the King's Liege-People.

So, *Idem, ibid.* 148. an Indictment for ſtopping an High-way, was ſaid to be——*ad Nocumentum diverſorum Ligeorum Domini Regis, &c.* and quaſhed, becauſe too particular, for that thereby only is intended a Nuſance to ſome, not all the King's Subjects.

So, *Leon.* 2 *Part* 183, 184. an Indictment was for not Repairing a Bridge; where ſaid ——*Ita quod Ligei Domini Regis ibidem tranſire non poſſunt, ad Nocumentum eorum*; and for that Exception was taken to it, becauſe not ſaid——*ad Commune Nocumentum*; for when the King's Subjects are named in an Indictment, it ought to be expreſſed to be a *Common Nuſance*.

So, *Mich.* 16 *Car.* 2. in *B. R. Rex verſus Morris*, an Indictment for keeping a Glaſs-Houſe———*ad magnum Nocumentum Subditorum Domini Regis*, was quaſhed, becauſe not ſaid ——*ad Commune Nocumentum*; and Serjeant *Maynard* doubted, if this Offence were Indictable.

And ſee *Cro.* 3 *Part* 90. *Leon.* 1 *Part* 117. and 27 *Aſſ.* 6. one was Indicted at the Aſſizes ——*Quare vi & armis*, he incloſed Land wherein others had Common; and Ruled, That an Indictment lies not in this Caſe, becauſe it is no *Publick*, but a *Private Nuſance*; and the *Vi & armis* ill, for one cannot forceably incloſe his own Land.

Laſtly, it was Objected, That the Indictment did not lye here, becauſe Juſtices of Gaol-Delivery have no power to take an Indictment of *Nuſance*.

And ſee *Bendl. Rep.* 152. an Indictment was Exhibited againſt one, for Erecting a Wear in the River *W.* which Concludes ——*ad Nocumentum omnium Inhabitantium in Comitatu* H. and Reſolved by the whole Court, tho' not ſaid to be——*ad Commune Nocumentum*, or———*Nocumentum omnium Ligeorum*,

Ligeorum, or *Subditorum*; yet General enough, becauſe a Nuſance to the whole County of *H.*

And ſee *Cro. Car.* 274, 275. an Indictment againſt one —— *Quare vi & armis*, he burnt his own Houſe; *Jones* and *Berkly* were of Opinion, That it did not lye *Vi & armis*, becauſe the Houſe was in the parties own poſſeſſion: But *Croke* was of the contrary Opinion, and ſaid, That if a Servant runs away with his Maſters Goods, committed to his charge, the Indictment againſt him ſhall be *Vi & armis.* *Vi & armis.*

And Note, That an Indictment upon the Statute of *Hen.* 6. of Forcible Entry, —— *Quod pacifice intravit & ipſum expulit & extraxit*, was Adjudged to be ill, for want of the words *Vi & armis*, & *manu forti.*

So, *Cro. Jacobi* 20. an Indictment upon the Statute of *H.* 6. not ſhewing how the Entry was *Pacifice*, or *Falſo*, was holden ill by two Judges.

And *Mich.* 13 *Car.* 2. in *B. R.* an Indictment upon the ſame Statute, ſaying *Paſifice ingreſſus*, for *Pacifice*, and having no *Manu forti* in the whole Indictment, was for that Reaſon quaſhed, and the Clerk of the Peace fined for it.

So *Cro. Caroli* 422. an Indictment for Erecting an Houſe upon the High-way, and ſtreightning it, *ill*, for want of the words *contra Pacem.* *Contra pacem.*

Mich. 16 *Car.* 2. in *B. R.* an Indictment was againſt one, for Seducing a Man into an ill Houſe, and cheating him of his Mony.

Incertainty.

By 29 *Aſſ.* 45. an Indictment againſt one as *Communis Latro*, or Common Foreſtaller, Champertor, Conſpirator, &c. without charging the Party with ſome particular Fact, is not good.

But by 30 *Aſſ.* 37. an Indictment of *Common Confederacy* is.

And by 38 *Aſſ.* 11, 12. an Indictment for taking Charters of Land quaſhed, for not ſetting forth what the Charters were.

But *Paſch.* 18 *Car.* 2. in *B. R.* and *Roll's Abridg.* 2 *Part* 79. an Indictment againſt one for being *Communis Oppreſſor*, was Ruled good upon Exception; but the Court was of Opinion, that——*Communis Forſtallator* is not good.

See *Mo. Caſe* 302. touching the words *Communis Fur, Latro, &c.*

A Rule to diſtinguiſh, where an Indictment, and where an Action of the Caſe doth lye.

Paſch. 16 *Car.* 2. in *B. R.* Reſolved, That an Indictment lies for the Breach of a Private Statute, where no particular Penalty is provided; if the Statute concern a multitude of Perſons, ſo as an Action of the Caſe will not lye: But if it concerns a Particular Perſon or Intereſt, an Action of the Caſe lies, and not an Indictment.

An

An *Information*, is a kind of *Declaration*, as well at the Suit of the King, as the Informer (therefore called a *Qui tam*, from the words in the Information, *A. B. qui tam pro Domino Rege, quam pro ſeipſo ſequitur*) for the Breach of ſome Statute, or Penal Law, wherein ſome part of the Penalty, as a Moiety or Third part, is given to him; and may be either by Action of Debt, or Information. *Information*, what?

Informations are alſo brought by the Attorney General only, in Caſes where the whole Penalty or Forfeiture is given, by ſome Penal Law, to the King.

Vide Co. 6 *Part*, *Gregory's Caſe*, 3 *Inſt.* 43, 194, 223, 340, 356. 15 *Eliz. ca.* 5. 29 *Eliz. ca.* 5. 21 *Jac.* 1. *ca.* 4. *Cro.* 3 *Part* 375. touching the Duty of an *Informer*.

By 18 *Eliz. ca.* 5. Every Informer upon Penal Statutes muſt Exhibit his Information in Perſon, not by Attorney; and purſue it by himſelf, or Attorney; a Note of the Day of the Month of the Entry of it muſt be made; no Jury muſt be Compelled to *Weſtminſter*, to Try any Offence done Forty Miles off, unleſs the Attorney General, for ſpecial Reaſons requires it; and the Informer not to make Compoſition, without Licenſe of the Court, on pain of Pillory.

By 15 *Eliz. ca.* 5. Defendants in *Informations* upon Penal Statutes, may Appear by their Attorneys, where they are Bailable by Law; or by the leave and favour of the Court.

But

But by 31 *Eliz. ca.* 10. This laſt Act ſhall only extend to Natural Subjects, and Denizens.

By the Statute of 21 *Jacobi ca.* 4. for all Offences againſt Penal Laws, the *Information* muſt be laid in the proper County where the Fact was done, and not to be received till the Informer hath made Oath, That it was done in that very County, and that within a Year before; and the Defendant may plead thereto the General Iſſue.

But this Statute ſhall not extend to *Informations*, touching Recuſants, Tonnage and Poundage, Tranſportation of Gold, Silver, Powder, Shot, Wool, Wool-fells, or Leather.

And by *Cro.* 3 *Part*, 138. *Co.* 3 *Part*, 138. 5 *Part*, 48. 583. 11 *Part*, 65, *b.* 3 *Inſt.* 141, 238. *Mo.* Caſe 715. *Leon.* 1 *Part.* 292. If the Informer dies, the Attorney General may proceed for the Kings Moiety after his death.

And ſo 'tis, if the Informer will not Proſecute any further.

And ſo, if the Attorney General will not Proſecute any further, or will not Reply, as the Courſe is for him to Reply alone, in theſe Caſes the *Informer* may Proſecute for his Part; for after the Suit begins the *Informer* hath an Intereſt, which the King cannot Releaſe, or Pardon.

And it appears by *Stile's Rep.* 329, 330. where an Action or Information is——*tam pro Domino Rege quam pro parte*; there, if the Judgment be Entred only for the Party, 'tis Erroneous.

And

And *Idem* 318, 319. upon an *Information*, where part of the Mony did belong to the King, the Party ſued Execution of all to himſelf; the Execution was ordered to be ſtayed, and a New one awarded, and in the mean time the Mony to be brought into Court.

And *Idem* 387. an *Information* was Exhibited for ſeveral Things; whereof ſome of them appeared to be done before the Date of the *Information*, and other part of them afterwards; yet all well, if done before the filing of the *Information*, and Bail upon it, for then the Action begins.

See *Mo.* Caſes 165. *Cro.* 1 *Part* 24. 2 *Part* 366, & 666. by *Dyer*, where a Statute appoints the *Information* to be brought within a Year; yet if it be brought within ſix years after, 'tis ſufficient for the Party.

And ſo *Cro.* 1 *Part* 341. in Demands leſs than due, good for the King, tho' ill for the Informer.

And ſee 35 *H.* 6. 27. *b.* in an *Information* for Detaining the Kings Goods, 'tis ſufficient to ſay, That they were in his Poſſeſſion, without ſhewing how they came, as it muſt be in Trover, or Detinue, by a Common Perſon.

See *Noy's Rep.* 118. where the Defendant pleads to an *Information* upon the Statute of 23 *H.* 8. for ſelling Beer without Licenſe, that there is another *Information* depending in the *Exchequer* for the ſame Offence; 'tis a good Plea, if there be no Covin in the Caſe, and if there be, the Informer may ſet it forth in his Replication.

Mich.

Mich. 22 *Car.* 2. an *Information* was brought in the *Kings-Bench* againſt one, for being *Perturbator Pacis & Communis Oppreſſor*, and for that he took unreaſonable Diſtreſs of divers of his Tenants; after Verdict, Judgment was ſtaid for Three Reaſons:

Firſt, Becauſe not ſaid which of his Tenants.

Secondly, For that *Information* lies not for unreaſonable Diſtreſs; but Action upon the Statute of *Marlbridge* 43.

Thirdly, Becauſe *Communis Oppreſſor*, and *Perturbator Pacis*, are words too General to ground an Information upon.

So *Hill.* 15 & 16 *Car.* 2. an *Information* was brought in the *Kings-Bench* againſt one for uſing the Trade of a *Draper*; and Ruled to be ill for two Reaſons:

Firſt, Becauſe not ſaying, it was a Trade at the time that the Statute of 5 *Eliz.* was made.

Secondly, Becauſe it wanted the words *Contra pacem.*

But *Mich.* 24 *Car.* 2. in *B.R.* an Information That *diverſis diebus & vicibus*, between ſuch a day and ſuch a day the Defendant did ſuch Offences, held good, tho' in a Criminal Caſe.

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A

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FINIS.